A Survey of Reclaimed Water Rights For Selected Western States

Reports from the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

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Executive Summary

Background. The original Reclaimed Water Act (codified as RCW 90.46) was adopted in 1992, which started water reuse in Washington State as a joint program between the Departments of Health and Ecology. The agencies developed standards for irrigation and commercial/industrial uses of reclaimed water, standards which were based substantially on water reuse standards and experiences in other states.

In 1995, the Legislature directed Ecology and Health to develop standards for wetlands and for ground water recharge as new uses for reclaimed water. By this time, based on stakeholder experience, it had become evident that the lack of certainty over reclaimed water rights was an impediment to widespread water reuse in this state. Concurrent with efforts on the standards for wetlands and ground water recharge, the agencies developed a proposal to address reclaimed water rights issues following a similar five-step approach:

A. Identify key issues
B. Survey other states
C. Critique for applicability to Washington State
D. Formulate draft policy recommendations for critique by agencies and stakeholders
E. Formulate final policy recommendations for reclaimed water rights in Washington

When the reclaimed water rights study was not funded, several interested stakeholders approached Ecology about pursuing steps A and B using volunteer attorneys, with a view toward at least starting to lay the foundation for further policy work sometime in the future. A work group of volunteer attorneys was convened, with oversight provided by a steering committee with representatives of Ecology, Health and the Attorney General's Office. King County graciously provided funding for Ecology to hire a summer legal intern to facilitate the Attorneys' Work Group. Rob Caldwell served as the legal intern from June to August of 1996.

The work group's first order of business was to compile a list of key issues and dimensions that would become the key questions for further legal research. Marty Walther, Ecology's water reuse engineer, had previously compiled an initial list of issues and dimensions, which the work group elected to use as a starting point. The work group critiqued and revised the list of issues and dimensions, and reformatted the list into a set of questions for further research by state. The group then assigned specific states to individual work group members to research statutes, case laws, and other state regulations and/or policies for reclaimed water rights. The results of these research efforts were compiled into individual state reports as presented in this volume.

This process generally worked quite well. Both the agencies and the work group are pleased with the quality of research that came from this effort. However, like all human endeavors, a few minor flaws did manage to creep in. While the group tried to cover all the western states, it appears that Wyoming, Utah and Nevada somehow fell through the cracks, either inadvertently not assigned or assigned to someone not able to devote as much time to this effort as originally expected. Also, it appears that Montana and Idaho were inadvertently assigned twice, with both versions included in this volume in order to give all the participating attorneys recognition for their work. Washington's reclaimed water legislation specifically cited Florida as a state with extensive experience with water reuse, so we decided to make Florida an honorary western state for purposes of this research into reclaimed water rights.

Major themes. The survey found that the most definitive statutory or case laws came from Oregon, California, Montana, Arizona, New Mexico and Wyoming. Two major philosophies emerged, tentatively called the No Impairment model and the Aluminum Can model.

The No Impairment model is based on the legal philosophy that downstream water rights are entitled to stream conditions that existed when they made their appropriation so far as necessary to satisfy their water rights. Water rights may not be converted from non-consumptive to consumptive uses to the detriment of other existing water rights. The water remains subject to appropriation even while carrying wastes within a pipeline, so wastewater effluent may be diverted to reclamation and reuse only so far as downstream water rights can still obtain their appropriation. Oregon follows this model based on an Oregon Attorney General's Opinion and subsequent legislation. California has an elaborate regulatory system for water management that considers possible impairment in their decision-making. Montana follows this model based on a statutory provision that explicitly makes sewage effluent a category of water subject to appropriation.

The Aluminum Can model is based on the legal philosophy that wastewater is not a category of water subject to appropriation, but rather is a waste product that can be handled however the generator sees fit in order to comply with federal and state environmental and public health laws. The recycled product belongs to whoever cleaned up the waste and recycled it. Arizona, New Mexico and Wyoming follow this model based on supreme court decisions in those states. In making those decisions, the state supreme courts explicitly rejected arguments for the No Impairment model. Downstream water users cannot acquire rights to upstream wastewater effluent, so there are no rights to be impaired if the effluent is diverted to reclamation and reuse. Although this volume does not have a report for Wyoming, the Wyoming case is mention and summarized in the 1973 Oregon Attorney General's Opinion, even though the Oregon Attorney General reached a different conclusion based on his interpretation of Oregon law and constitution.

Recent developments. In the fall of 1996 and winter of 1997, Ecology convened a Reclaimed Water Rights Policy Work Group to attempt to build on the foundation laid by the Attorneys' Work Group. The Policy Work Group looked at the major interests of various parties and at impediments to water reuse, then attempted to identify policy options for reclaimed water rights in Washington State and perhaps develop a consensus as to a policy direction they would recommend to Ecology.

Concurrently with this effort, the State Legislature considered and adopted Senate Bill 5725, which in part addressed reclaimed water rights policy issues and which made further effort by the Policy Work Group unnecessary. SB 5725 essentially adopted a hydrid of the Aluminum Can and No Impairment models. Reclaimed water belongs to the generator, with no requirement to obtain a water right permit to generate, distribute or use the reclaimed water. However, reclamation and reuse must not impair any existing downstream fresh surface water rights unless mitigation or compensation is provided.

SB 5725 greatly simplified the regulatory process for water reuse, especially for historic wastewater discharges to marine waters, to ground water via land application, or to very large surface water bodies where effluent domination is not an issue. For effluent-dominated streams, the issue of how wastewater effluent can be appropriated prior to discharge to the receiving stream is still not clear in either statutory or case law. As a practical matter, however, most water reclaimers will probably strive to avoid litigation on the issue, so will scale their projects back to a volume such that there is no perceived reliance by downstream water rights on the effluent to be diverted to reclamation and reuse.

Ecology is indebted to all the volunteers for the Attorneys' Work Group and the Reclaimed Water Rights Policy Work Group for the many hours of thoughtful time spent on these efforts. Several of the stakeholders most active in these two work groups were also actively supportive of SB 5725 as it worked its way through the legislative process. The legal research and policy discussions by the two work groups had a very definite, although indirect, impact on the policy direction for reclaimed water rights ultimately selected by the Washington State Legislature.

A Survey of Reclaimed Water Rights For the States of Oregon and Idaho

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

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RECLAIMED WATER RIGHTS
A Survey of Oregon and Idaho Law

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OREGON

I. Introductory Summary

A. Consumptive v. Non-consumptive Uses

In Oregon, all water is owned by the state and the doctrine of prior appropriation governs acquisition of water rights. Water rights contained in an appropriation permit are limited to a specific place, nature, and quantity of use. A use which has historically resulted in a discharge or a return flow is considered "non-consumptive." Wastewater discharged into a natural watercourse becomes part of the natural flow and is subject to subsequent appropriation. An appropriator who seeks to change uses from one historically resulting in a discharge and therefore non-consumptive to a consumptive use (e.g. irrigation) must obtain a "change of use" permit. Issuance of a change of use permit is subject to an injury test to protect rights of downstream appropriators who relied upon the historic discharges when establishing their water rights. In general, an appropriator seeking to reclaim water must obtain a permit authorizing the change of use, e.g. reclamation and reuse versus discharge.

B. Municipal Reclaimed Water

In 1991, the Oregon legislature sought to facilitate the use of reclaimed water by its predominant producer, namely municipal sewage treatment facilities, by exempting their reuse of treated wastewater from the requirement for a change of use permit. The legislation defines "reclaimed water" as:

> water that has [1] been used for municipal purposes and after such use [2] has been treated in a sewage treatment system and that, as a result of treatment, [3] is suitable for a direct beneficial purpose or a controlled use that could not otherwise occur.

O.R.S. § 537.131. Municipalities which file a "reclaimed water registration form" are exempt from standard appropriation permitting requirements and in general avoid an investigation into the potential downstream impacts of their use of reclaimed water. The statutory scheme governing reclaimed water, along with relevant case law and attorney general opinions, is set forth below.

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[1]Summer Associate Eric Scott Carnell assisted in preparation of this report.

II. Issues and Dimensions Worksheet: Questions & Responses

1. Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?
In Oregon, all uses of water are subject to the water rights laws of the state which either require a permit or provide an exemption for the use. Reclaimed water is defined by statute and is governed both by statute and administrative regulation.

A. Is the water regulated as (a) surface water, (b) ground water, or (c) developed water?
As defined, municipal reclaimed water can include water originally appropriated from both surface and ground water sources. Oregon's municipal reclaimed water statutory provisions provide an exemption from surface water permitting requirements. (Proposed provisions for industrial reclaimed water would apply only to "groundwater which has been appropriated and used for industrial or confined animal feeding purposes and is reused for irrigation." Draft House Bill Relating to Water Rights Permits, June 10, 1996, at § 537.141(h)).

B. What terms are used to define reclaimed water?
"Reclaimed water" is defined as water that has **(1)** been used for municipal purposes, **(2)** has been treated in a "sewage treatment system," and **(3)** is suitable for a direct beneficial purpose. O.R.S. § 537.131.

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?
Rights in municipal reclaimed water are governed specifically by statute. Municipalities enjoy an exemption from appropriation permitting requirements for reclaimed water as defined in B above. All others seeking to apply reused water for beneficial use must apply for a "change of use" permit in order to obtain rights for use of reused water.

D. Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses?
Oregon's DEQ has limited reclaimed water use to various irrigation, industry, and construction purposes, dependent upon the level of treatment applied to the water. O.A.R. § 340-55-015, Table 1.

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2. How do other states interpret the authority and obligations of water rights holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?
A. Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so how?
An appropriation permit includes within it the right to recapture waters abandoned or lost on the territory covered by the permit. Cleaver v. Judd, 238 Or. 266, 393 P.2d 193, 195 (1964). Abandonment or loss are separate and distinct concepts from discharge. If the permit holder is not a municipality and if the wastewater has historically been discharged (e.g. the permit covers

a non-consumptive use), the permit holder must obtain a "change of use" permit before making any use of reclaimed water. The "change of use" permit requires the applicant to demonstrate no injury to other appropriators. O.R.S. § 540.520; see 2(C) above.

B. *What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?*
Prior to Oregon's 1991 reclaimed water legislation, the use of reclaimed water was specifically limited to the scope (nature, place, and quantity of use) of an appropriator's original permit. Use of reclaimed water could not result in water usage above the quantity stated in the original permit, nor could reclaimed water be used for a purpose or on a location not specifically covered by the water right.

The 1991 statute carved out an exception for municipal reuse. The **quantity** of reclaimed water used by a municipality is potentially subject to the limitation: if the amount reclaimed exceeds 50% of the average flow in the former discharge location, then downstream appropriators will be given preference over the reclaimed water upon demonstrating a substantial impairment of their ability to satisfy their existing water rights. The potential **uses** of municipal reclaimed water are prescribed by DEQ regulation. The **place** of use for municipal reclaimed water is not limited to the land to which the water right is appurtenant (O.R.S. § 540.510(3)(a)(C)), provided all NPDES and WPCF permit limitations are met and DEQ's fish and wildlife impact review is satisfied (O.R.S. § 537.132(1)(C)). It is not clear whether the appurtenancy exemption would extend to a use of water outside the basin of origin. See O.R.S. § 537.803(1); B(iii) below.

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use? For example: if the original permit is for municipal use of water, can the permittee recycle the water and use it for surface spreading or industrial uses without first obtaining a permit? If so how.
For an entity which is not a municipality, secondary use of reclaimed wastewater (e.g. a consumptive use) which would otherwise have been discharged (e.g. a non-consumptive use) is not allowed without obtaining a "change of use" permit. For municipalities, see 2(B) above.

(ii) Do states impose extraordinary conditions on permits for secondary uses of reclaimed water, i.e. do states restrict reclaimed water to particular manners of use?
DEQ regulations govern the treatment and use of reclaimed water. The nature of uses depends upon the extent of treatment and monitoring at the municipal sewage treatment facility. See 1(D) above.

(iii) Do states restrict the use of reclaimed water to a particular place? For example, is the use of reclaimed water restricted to the same place of use as the water that generated the wastewater?
The general appurtenancy requirement of a water right in Oregon is relaxed in the case of a municipality having filed a reclaimed water registration form. O.R.S. § 540.520(3)(a)(C). In all other cases, reclaimed water can only be applied to the land covered by the original water right, unless the right holder obtains an order authorizing a change of place of use under O.R.S. §§ 540.520, 540.530.

Diversions of water from the basin of origin require application for a change of place of use outside the basin of origin. O.R.S. §§ 537.801 et seq. The appurtenancy exemption for municipal reclaimed water does not refer to use outside the basin of origin. It is possible that a municipal reclaimed water registration form proposing use outside the basin of origin would be subjected to review procedures contained in O.R.S. §§ 537.803, 537.805.

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3. Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?

The 1991 legislation allowing for municipal reclaimed water usage responded to 1973 and 1980 Oregon Attorney General opinions which established the right of third-party downstream appropriators in historical wastewater discharges. Currently, a municipality's ability to use reclaimed water for a consumptive purpose is subject to the condition that if such use results in a 50% diminishment of average flow in the receiving water body, then third-party users will be given a priority in the reclaimed water upon a showing of injury.

A. Can wastewater and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?

Wastewater discharged is considered to have returned to the natural flow of the receiving water body and is subject to appropriation.

(i) Is the source of water important? Not specifically addressed in Oregon.

(ii) Is the use of imported water by the importer restricted by third party claims? Not specifically addressed in Oregon.

(iii) Does equity play a role in determining who is entitled to the use of wastewater? For example: does the party that incurs the labor and expense have a superior right to the water against third party claims?

The appropriation permit exemption which is currently allowed for municipality sewage treatment facilities can be said to evidence a recognition of the costs borne by municipalities in treating wastewater. Equity in Oregon, however, appears to protect the reliance interests of downstream appropriators who historically have relied upon the discharge of sewage treatment facilities. Downstream interests prevail over the interests of those incurring the labor and expense of treatment in the event reclamation of formerly discharged water would result in a 50% reduction of average flow and the downstream interests are "substantially impaired" by reuse of reclaimed water. O.R.S. § 537.132(3-4); see 2 above.

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4. Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including in-stream flow levels?

Unlike the protection afforded downstream appropriators by the 1991 legislation (see response to 3), there is no specific provision for protection of in-stream water rights and flow levels. Oregon has specific legislation governing in-stream water rights. O.R.S. §§ 537.332 et seq. In-stream water rights are subject to standard priority.

There are at least three arguments for protection of in-stream water rights and flow levels under the 1991 legislation. First, any municipal reclaimed water registration is subject to review by DEQ to determine whether the use of reclaimed water would have "a significant negative impact on fish and wildlife." O.R.S. 537.132(1)(b). Second, a reclaimed water registration requires a DEQ determination that "the use of reclaimed water is intended to improve the water quality of the receiving stream." O.R.S. § 537.132(1)(c). Third, an in-stream water right could be protected under the injury test discussed in 3 above. O.R.S. § 537.132(3-4).

A. Does the introduction of wastewater and/or reclaimed water, into a natural stream system, which then increases the volume of the natural stream, then become part of the natural stream by entry therein?

Wastewater or reclaimed water introduced into a natural stream system is considered part of the natural watercourse and is subject to subsequent appropriation.

B. Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for in-stream uses a beneficial use of water?

There are no specific provisions pertaining to the beneficial use of wastewater or recycled water for in-stream uses. Nevertheless, statutory provisions govern the establishment of in-stream water rights in general. O.R.S. §§ 537.332 et seq. Among the in-stream water rights potentially recognized are conservation, maintenance and enhancement of aquatic and fish life, protection of water quality standards, pollution abatement, recreation and scenic attraction. O.R.S. §§ 537.332(5), 537.336. Currently, the provisions relating to in-stream water rights focus on stored reservoir water and levels of appropriation.

(i) Is a permit necessary for in-stream uses of wastewater and/or recycled water?

A certificate for an in-stream water right is required and while not specifically addressed, would presumably be required for in-stream use of wastewater as well. O.R.S. § 537.341.

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5. How have other states considered the rights of third parties, including other water users, when these third parties are benefitted by wastewater discharges created from the use of water which has been imported from other basins?

Oregon does not have a specific separate doctrine for trans-basin waters. For rights of third parties benefitted by wastewater discharge, see 3 above.

A. Is wastewater, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?

Wastewater which contains foreign waters and which is discharged into a natural stream is deemed part of the natural flow and is subject to appropriation in accordance with standard priority. Cleaver v. Judd, 238 Or. 266, 393 P.2d 193, 196 (fact that part of waste or seepage water may have had its source in another irrigation district considered immaterial).

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6. Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate water and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?

Generators of reclaimed water (as defined by statute) are only municipalities. Municipalities are not afforded any special rights to appropriate water other than the exemption from standard appropriation permitting requirements discussed in 2(B) above. Groundwater recharge is not included in DEQ's list of potential uses for reclaimed water. Discharge of reclaimed water for augmentation of surface flows returns the water to the natural flow, thereby placing it within the general priority appropriation regime. Such discharge by a municipality does not entitle it to increase the amount of any prior permitted appropriations.

A. Is there a different analysis if the generator is an entity other than the holder of the original water right?

Underlying Oregon's reclaimed water statute is a presumption that the generator of the reclaimed water is a municipality. Therefore, there is no identifiable separate analysis from that stated in 6 above.

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8. What issues pertaining to the use of reclaimed water are unique to the particular state?

The first particularity of Oregon's reclaimed water statute is its limited scope whereby reclaimed water is only water which was used for municipal purposes and treated in a sewage treatment system. Oregon is currently considering the expansion of reclaimed water rights beyond the current municipal context to include industrial process water producers.

A second notable issue is the treatment of downstream water rights affected by reclamation and reuse. In the Tualatin River Basin dispute, the Oregon Attorney General recognized water rights of downstream appropriators on the Tualatin as property rights which could not be taken without payment of just compensation. 36 Op. Att'y Gen. 318, 320, 328 (1973). The 1991 legislation attempts to avoid this takings issue through the notice and injury test provisions which afford downstream appropriators a preference in reclaimed water in the event reclamation results in a 50% reduction of average flows and a substantial impairment of their water rights. O.R.S. § 537.132(3-4). Whether this injury test would in fact withstand constitutional scrutiny is an open question.

A third particularity is the fact that during the approximate five year life of the 1991 legislation, no municipal reclaimed water registration forms have been filed. Efforts are, however, underway

to bring municipalities into compliance with the registration requirement. The delay perhaps speaks to the practicality of the approach.

Finally, the consumptive versus non-consumptive distinction drawn by the Oregon Attorney General is notable for the additional layer of complexity it adds to the appropriation priority scheme. The distinction between uses reflects Oregon's policy of protecting downstream water rights where there has been a historic discharge. Judging from conversations with members of Oregon's Water Resources Department and with groups representing downstream appropriators, this policy is the subject of substantial continuing debate.

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9. What is the role/authority of Indian Tribes, Bureau of Reclamation, Corp. of Engineers, or other Federal laws?
In the event of a dispute arising from reclaimed water usage affects an existing water right of a federally recognized Indian tribe, the Oregon Water Resources Director is assigned a negotiation capacity to define the scope and attributes of the Indian tribe's rights. O.R.S. § 539.300 et seq.

III. Case Digests and Analysis of 1991 Legislation

A. Water Rights Cases and Opinions

Under Oregon law, an appropriator using water for a purpose specified in a permit may recover or recapture wastewater or seepage remaining on her own land, subject to the requirement that it subsequently be put to a use within the territorial and use boundaries of the permit. When water either leaves the control of the owner or is discharged into a natural watercourse, the water is recognized as free and unappropriated. Although the property right in the water once used ceases once possession is lost or abandoned, the loss of the specific water does not entail a loss of the water right itself. Therefore, while a downstream appropriator may use water previously lost or abandoned, the downstream appropriator is not entitled to compel a similar abandonment in the future. A downstream appropriator may be entitled to compel a discharge where there exists a historic discharge which the downstream appropriator relied upon in establishing its water right.

i. 36 Op. Att'y Gen. 318 (1973)(Unified Sewage Agency Tualatin River Basin Dispute).

Facts: The Unified Sewage Agency (USA) operated a number of treatment plants serving the Portland area which discharged into the Tualatin River. The USA proposed a new plant which would have piped sewage overland and discharged into the Willamette River. Meeting water quality standards for the Tualatin River would have required tertiary treatment whereas secondary treatment sufficed for discharge into the Willamette. The discharges into the Tualatin represented approximately 25% of the river's average flow.

Issue: Whether downstream appropriators on the Tualatin were entitled to continuation of the waste flows from the sewage treatment plants.

Opinion: Appropriation rights are divided into consumptive and non-consumptive uses. An appropriator may not change from a non-consumptive to a consumptive use if such a change would adversely affect other appropriators. The justification for protecting subsequent appropriators is that they made their appropriations on the reasonable assumption that the conditions existing at the time their appropriations were made would continue. In effect, the attorney general opinion recognized a separate priority system for consumptive versus non-consumptive water rights.

The Attorney General found it evident that use of water for carriage of sewage is a non-consumptive use. The proposed diversion from the Tualatin to the Willamette was tantamount to a change from a non-consumptive to a consumptive use in the eyes of downstream Tualatin appropriators. Any diversion from the Tualatin to the Willamette constituted a condemnation of the downstream appropriators' property rights and would require payment of just compensation.

ii. Cleaver v. Judd, 238 Or. 266, 393 P.2d 193 (1964).

Facts: Dispute between farmers and irrigation district regarding rights to water in a draw running through irrigation district. The irrigation district maintained that water in the draw consisted solely of irrigation waste and seepage waters along with occasional surface water runoff. As such, the irrigation district sought to recapture water in the draw for application on its lands. Farmers contended that the draw contained water from other sources sufficient to characterize the watercourse as a stream.

Held: Waste or seepage water may be recaptured and applied for beneficial use within the boundaries of the original appropriator. Downstream appropriators who have previously used the waste and seepage waters have no cause of action for being deprived of the water and cannot compel a similar abandonment in the future. In sum, loss or abandonment of specific water does not constitute an abandonment of the water right itself. The fact that part of the waste or seepage water may have had its origin in a different irrigation district was regarded as immaterial.

iii. Jones v. Warmsprings Irrigation Dist., 162 Or. 186, 91 P.2d 542 (1939).

Facts: Downstream appropriators sued Irrigation District which constructed a reservoir on a river above plaintiffs point of diversion. The Irrigation District constructed drainage ditches directing irrigation seepage and return flow to the reservoir. Previously the irrigation water reached the river only through seepage. The downstream appropriators sought a ruling that they were entitled to all of the waste and return flow from the irrigation district's land.

Held: Recognizing that an appropriator is justified in recovering waste or seepage water on his own land, the right to recapture is nevertheless subject to abandonment. When water leaves the irrigation district land or the control of the owner of the land, the water returns to the stream and is recognized as free and unappropriated. Jones, 162 Or. at 198-99. Here, the irrigation district had abandoned the right to recapture and could not subsequently claim the water "to the detriment

of one who in good faith had appropriated it and was using it for beneficial purposes." Id. at 197-98.

B. 1991 Municipal Reclaimed Water Legislation

In the wake of the 1973 Tualatin River Basin opinion and a 1980 Attorney General opinion affirming the earlier position, 40 Op. Att'y Gen. 202 (1980), it was clear that where a sewage treatment facility which had historically discharged its effluent sought instead to either divert or recapture it, the facility would be required to obtain a change of use permit from a non-consumptive to a consumptive use. Where such a change would result in an adverse affect on existing water rights, it could not be approved by the Water Resources Director.

In 1991, the Oregon Legislature passed legislation intended to exempt municipal sewage treatment facilities from the change of use permitting requirements in the event they should seek to apply reclaimed water to a beneficial use. The definition of "reclaimed water" contains essentially three requirements. First, it must have been used "for municipal purposes." Second, it must have been treated in a "sewage treatment system." Third, it must be suitable for a direct beneficial purpose or controlled use that could otherwise not have occurred. O.R.S. § 537.131.

Municipal "reclaimed water" is exempted from standard appropriation permit requirements. O.R.S. § 537.132. The exemption is subject to three conditions: (1) authorization of the proposed use of the reclaimed water in a NPDES or Water Pollution Control Facilities (WPCF) permit; (2) review by DEQ regarding fish and wildlife impact; and (3) determination by DEQ that "the use of reclaimed water is intended to improve the water quality of the receiving stream."

i. Injury Test: Protection of Downstream Appropriators

In light of the concerns stated in the 1973 Tualatin River Basin Attorney General opinion regarding protection of the reliance expectations of downstream appropriators, the 1991 legislation contains an injury test. Section 537.132(3-4) states:

> (3) If a municipality has discharged wastewater into a natural watercourse for five or more years, and the discharge represents more than 50 percent of the total average flow of the natural watercourse and if such discharge would cease as a result of the use of reclaimed water . . . , the director of the [Water Resources] department shall notify nay persons who . . . have a water right that may be affected by the cessation of the discharge by the municipality.
> (4) If a person holding an affected water right demonstrates to the department that the cessation of discharge by the municipality substantially impairs the ability to satisfy the water right, the person shall be entitled to a preference to the use of the reclaimed water.

In the event injury is demonstrated and the preference over reclaimed water is claimed, the statute provides that delivery of the water shall be accomplished by a "conveyance facility or channel other than a natural watercourse." O.R.S. 537.132(4).

Unlike the protection afforded downstream appropriators, there is no specific protection provided for in-stream water rights jeopardized by reclamation and reuse. In-stream water rights are recognized in O.R.S. §§ 537.332 et seq. and are given a priority date as of their entry into force. By all accounts, the issues of protection for downstream appropriators and in-stream rights represent potentially the most divisive aspects of the reclaimed water debate in Oregon.

ii. Appurtenancy Requirement

The general rule in Oregon is that a water right is appurtenant to the land for which it is permitted and used. Any change in the place of use requires a "change of place of use" permit. O.R.S. § 540.510. An exception to the appurtenancy requirement for municipal reclaimed water is recognized in O.R.S. § 540.510(3)(a)(C):

> Any water used under . . . the registration system set forth in O.R.S. 537.132 [reclaimed water], may be applied to beneficial use on lands to which the right is not appurtenant if: . . . The use is authorized under a permit granted under O.R.S. 468B.050 [NPDES permit] and for which a reclaimed water registration form has been filed under O.R.S. § 537.132.

iii. Section 537.132 Registration System

Section 537.132 contemplates that any municipality intending to put reclaimed water to a beneficial use shall file a certificate of registration with the Water Resources Department. The registration form is to include information such as the source of the reclaimed water, nature and amount of proposed use, location of proposed use, and method of conveyance to said location. O.R.S. § 537.132(2). Water Resources has only recently begun making registration forms available (see tab 9). No municipal reclaimed water registration forms have been submitted in the approximately five years since O.R.S. §§ 537.131, 537.132 entered into force.

iv. DEQ Regulations

Pursuant to the 1991 reclaimed water legislation, the Oregon DEQ issued regulations governing the treatment requirements for reclaimed water and enumerating potential uses per treatment category. O.A.R. §§ 340-55-005 et seq. The uses include agricultural irrigation, municipal irrigation (parks, playgrounds, schoolyards, golf courses, cemeteries, highway medians), industrial or commercial uses, and construction use. O.R.S. § 340-55-015, Table 1. Under all circumstances, use of reclaimed water must meet the water quality standards stated in the applicable NPDES or WPCF permits.

v. 1995 Proposed Bill: Expansion of Reclaimed Water to Industrial Use

In 1995, a bill was presented to extend the exempt status for reclaimed water enjoyed by municipalities to industrial users. H. Bill 2375 (1995). Industrial users' principal interests in reclaimed water usage are for discharge of process water and irrigation. Concern exists, however, over extending water rights beyond the place and scope of use embodied in the industrial appropriator's original permit.

The Oregon Legislature has directed Water Resources and DEQ to report in December recommending policy alternatives pertaining to reclaimed water, specifically industrial use. In order to appease concerns of downstream users and environmental groups seeking to protect in-stream water rights, the reclaimed water task force has made the following recommendations for limiting the exemption afforded to industry: (1) limit the exemption to reclaimed water originating in groundwater sources where there has not been a historic discharge to a stream; (2) restrict the scope of land application to agricultural purposes; and (3) restrict land application to land with an existing water right. HB 2375 Task Force, Report to the 1997 Legislature, Re-Use of Process Water Task Force (HB2375), June 13, 1996. The task force has also suggested expanding the definition of reclaimed water by substituting "wastewater" for "sewage" in the current definition. Mem. from Barry Norris to Reclaimed Water Task Force, July 12, 1996.

RECLAIMED WATER RIGHTS

IDAHO

I. Summary

Idaho water rights law provides for private ownership of the corpus of water after diversion, but qualifies the ownership right with the requirement of beneficial use. Glaven v. Solmon River Canal Co., 258 P. 532, 534 (Idaho 1927). Unlike Oregon, Idaho has not developed a specific statutory scheme addressing reclaimed water.

It is clear under Idaho law that water discharged into a water course is deemed to have returned to the natural flow and is subject to appropriation to fill junior right holders. Seepage and return flow waters are available for appropriation, but a downstream appropriator has "no vested right in waste or seepage waters as against the paramount owner thereof." Sebern v. Moore, 44 Idaho 410, 258 P. 176, 178 (1927). It follows that in Idaho, wastewater belongs to the original appropriator and may be claimed if put to beneficial use. The issue of whether a water rights holder which has historically discharged its effluent may instead reclaim it, thereby reducing the amount of water available for downstream appropriators, has not been specifically addressed in Idaho.

Water exchanges or transfers are recognized in Idaho by statute and case law, subject to the requirement that they not infringe upon the rights of other water users. IDAHO CODE § 42-105; Almo Water Co. v. Darrington, 95 Idaho 16, 501 P.2d 700, 704 (1972). Any change in the place or nature of the use contained in a water rights permit must be approved upon application to the state Department of Water Resources. IDAHO CODE § 42-222(1).

Currently, municipalities use treated wastewater, or reclaimed water, for a variety of purposes including irrigation of parks, cemeteries, and golf courses. While such uses are not specifically authorized either by statute or case law, no challenge has been made to municipal use of reclaimed water. Telephone Conversation with John Homan, Deputy Idaho Attorney General, Water Resources (July 17, 1996).

II. Case Digests

A. Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (1984).

Facts: Action to quiet title on water rights arising from 1910 decree.

Held: Decree was conclusive proof of a water right. All rights to water are appurtenant to the land for which the right is granted. Once established, a water right is subject to statutory forfeiture upon failure for five years to apply the water to a beneficial use or to common law abandonment which requires proof of intent to abandon along with a showing of actual relinquishment or surrender of water rights.

B. Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc., 619 P.2d 1130, 1134 (Idaho 1980).

Facts: Dispute between parties over agreement on competing rights to spring waters. Defendant's water right was superior in time and defendant operated the diversion works conducting the water to plaintiff and others. Plaintiff benefitted from seepage which he sought to have continued.

Held: No appropriator of wastewater should be able to compel any other appropriator to continue wasting water to benefit the former because recognition of a right in a third person to enforce the continuation of waste will not result in more efficient uses of water. "[A] senior appropriator of water retains his right to surface waste and seepage water, and may reclaim it, even though such water has been used by a junior appropriator, even for as long as forty years."

C. Sebern v. Moore, 44 Idaho 410, 258 P. 176 (1927).

Facts: Prior appropriator had drawn from irrigation waste and seepage waters which were subsequently diverted in a new drainage canal. Prior appropriator sought to divert water from the drainage canal to fill his appropriation. Drainage district contended their statutory authorization to construct drainage canal conveyed a valid and superior appropriation right in the waste and seepage waters.

Held: Drainage district had no vested right in the waste and seepage waters as against the paramount owner thereof. The appropriation of surface waste and seepage waters by the drainage district was "subject to the right of the owner to cease wasting it, or in good faith to change the place and manner of wasting it, or to recapture it, so long as he applies it to beneficial use."

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22. Mark Tader, *Note: Reallocating Western Water: Beneficial Use, Property, and Politics*, 1986 U. ILL. L. REV. 277 (1986).

23. Frank R. Booth, *Ownership of Developed Water: A Property Right Threatened*, 17 ST. MARY'S L. J. 1181 (1986).

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A Survey of Reclaimed Water Rights For the State of Idaho

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

James A. McDevitt

Preston Gates and Ellis

I. WATER RIGHTS PERTAINING TO RECLAIMED WATER IN IDAHO.

A. General Statement.

The Idaho statutes and case law do not address the subject of rights to sewage effluent and reclaimed water. However, a small portion of Idaho law exists on the topic of rights to waste water from seepage or irrigation runoff. This is the closest Idaho has come to a discussion of reclaiming sewage effluent or gray water. Therefore, the answers to the following questions will stem from an analysis of the Idaho law on the subject of irrigation waste water.

B. Answers to Issues and Dimensions.

1. Does Idaho regulate and administer the beneficial use of waste water effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?

The State of Idaho does not distinguish between waste water and water in general. Assuming that sewage effluent and reclaimed waste water would fall into the category of "water" in a discussion regarding who may acquire a right to appropriate the waste, then the discussion falls under the general law of water rights for Idaho, codified under Idaho Code, Title 42. This is probably a safe assumption, given §42-107, which states, "[a]ll ditches . . . for the purpose of utilizing seepage, waste or spring water of the state shall be governed by the same laws relating to priority of right as those ditches . . . for the purposes of utilizing the waters of running streams." If reclaimed irrigation waste water is analyzed under the same laws as regular water, then it is logical to assume that reclaimed sewage water would be also analyzed under those laws.

Idaho recognizes the doctrine of prior appropriation in regard to water rights. Provided a land owner puts the water he takes to beneficial use, the first to take the water is the first to establish the right. I.C. §42-104; 106 (1996). This is true for waste water as well, with the caveat that one who appropriates waste water does not have a legal remedy to force another into continuing to waste water. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980). Therefore, Idaho would probably analyze rights to sewage effluent under the doctrine of prior appropriation, but subject to a requirement that a downstream appropriator cannot force an upstream appropriator to continue to waste sewage at the level he has done so traditionally.

A. Is the water regulated as:
- *(a) Surface water;*
- *(b) Ground water;*
- *(c) Developed water?*

Waste water is not categorized into one of the above three options. The statutes subject it to the doctrine of prior appropriation, and leave it at that. Both surface water and ground water rights are tethered to the notion of first in time, first in right. I.C. §42-104; 226. Thus it does not matter whether the sewage effluent is categorized as surface or ground water, as the rights to both are established in essentially the same manner.

B. What terms are used to define reclaimed water?

Reclaimed water is defined in Idaho cases as seepage water,[1] and surface waste,[2]

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?

They are acquired through the doctrine of prior appropriation, as discussed above.

D. Is the permit for the use of waste water effluent and/or reclaimed water limited to specific uses?

The use must be beneficial (42-106).

2. How does Idaho interpret the authority and obligations of water right holders to use or sell waste water effluent or reclaimed water derived from the water right holder's first use of water?

A water right is considered real property, and may be sold and conveyed separately from the land upon which it is used, the same as any other real property. *Hard v. Boise City Irrigation & Land Co.*, 9 Idaho 589, 76 P. 331 (1904); *Crow v. Carlson*, 690 P.2d 916, 921 (Idaho 1984) (water right runs with the land unless it is separately conveyed to other property); *see also* I.C. §55-101. Presumably then, a right to sewage effluent could be sold as well. Also, it would seem appropriate under Idaho law to lease the water right, or only sell a portion of it, as those transactions can be accomplished with real property.

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[1] *Hidden Springs* at 1133; *Sebern v. Moore*, 258 P. 176, 178 (1927).
[2] *Hidden Springs* at 1133; *Sebern* at 178; *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173, 157 P.2d 1005 (1945).

A. Does Idaho law expressly include or exclude the use of waste water or reclaimed water within the scope of an original water right? If so, how?

Waste water or reclaimed water is neither expressly included nor expressly excluded.

B. What authority or role does Idaho have for the use of reclaimed water to the extent its use is beyond the scope of the original water right?

(i) Does Idaho allow the secondary use of waste water and/or recycled water by the original permittee without a water right permit for the secondary use?

The law is unclear on this subject. I would assume that since waste water can be reclaimed without a subsequent permit, sewage effluent could as well. However, there is no legal authority in Idaho that expressly supports this assumption.

(ii) Does Idaho impose extraordinary conditions on permits for secondary uses of reclaimed water, i.e., does Idaho restrict reclaimed water to particular manners of use?

The use must be beneficial.

(iii) Does Idaho restrict the use of reclaimed water to a particular place. For example, is the use of reclaimed water restricted to the same place of use as the water that generated the waste water?

Once again, I assume that since water is considered real property, any portion thereof should be transferable to another piece of property.

3. **Under what circumstances, if any, has Idaho considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?**

A third party may appropriate waste water, but may not force another party to continue to waste water. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

4. **Under what circumstances, if any, has Idaho considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?**

All applications for water permits are reviewed by the department of water resources. I.C. §42-203A. The director of the department may refuse to issue a permit for the following reasons:

a. it will reduce the quantity of water under existing water rights;
b. the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
c. it appears to the satisfaction of the director that such application is not made in good faith, or is made for delay or speculative purposes;
d. the applicant has not sufficient financial resources with which to complete the work involved therein
e. it will conflict with the local public interest;
f. it is contrary to the conservation of water resources within the state of Idaho. I.C. §42-203A.

Therefore, Idaho has considered the impact on the overall availability of water and the impact on the environment in regard to the issuance of water permits in general. It has not discussed the specific issue of sewage effluent, however.

5. **How has Idaho considered the rights of third parties, including other water users, when these third parties are benefited by waste water discharges created from the use of water which has been imported from other basins?**

   A. *Is waste water, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?*

A third party may appropriate waste water, but may not force another party to continue to waste water. *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 101 Idaho 677, 619 P.2d 1130 (1980).

6. **Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged ground water or augmented surface flows that derive from the use of reclaimed water for these purposes?**

Idaho has not granted any "special rights" to generators of reclaimed water.

A Survey of Reclaimed Water Rights
For the States of New Mexico and Montana

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

Lee Rees

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RECLAIMED WATER

SURVEY/RESEARCH TWO STATES' APPROACHES

NEW MEXICO AND MONTANA

ATTORNEY WORK GROUP ON RECLAIMED WATER ISSUES

This is a preliminary survey of two states' water rights approaches and decisions regarding reclaimed water: Montana and New Mexico.

1) EXECUTIVE SUMMARY:

The following summarizes Montana and New Mexico's approaches to reclaimed water:

1) New Mexico Reclaimed water is generally treated as artificial water. However, since there is a presumption of hydraulic continuity between streams and groundwater, any diversion requires a concomitant return to the hydrological system. Every new water right is now conditioned with both a diversionary right and a consumptive use right designated on the permit. Permits generally require the non-consumptive portion of the total diversion be returned to the source. If a secondary use is allowed, the appropriator must "make up" the water loss to the hydrological system. An exception to this rule has evolved for municipal "treatment" of sewage effluent. Sewage effluent is artificial water, subject to the control of the municipality. Thus, the municipality may take the sewage effluent and reuse it for municipal purposes. The effluent water remains private until the municipality has lost control over the water. At this point, the water would become public water:

2) Montana. Reclaimed water may be appropriated as any other waters of the state. Generally effluent is considered waste water, which an appropriator may intercept and recapture without express authorization from the State Engineer. There are, however, certain restrictions on the re-use of wastewater effluent and/or reclaimed water. No change in place of use or type of use would be allowed without authorization by the State Engineer. Municipalities appear to have broad authority to re-use effluent. So long as a municipality does not express an intent to expand its beneficial municipal use beyond municipal boundaries, it appears a municipality may reclaim the water without restriction.

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BASIC WATER SCHEME:

- New Mexico: New Mexico follows the prior appropriation doctrine, first-in-time-first-in-right. Unfortunately, there is little guidance in the statutes, virtually no procedural or substantive regulations and a dearth of case law. New Mexico water rights are split into pre-jurisdiction and post-jurisdiction categories. Some of the pre-jurisdictional claims date back to 1598. Post jurisdictional water rights started around 1907, when the New Mexico surface water code came into effect.. The general rule is that water under the control of the appropriator is his water to use pursuant to the terms of the permit.

- Montana: Montana follows the prior appropriation doctrine, first-in-time, first-in-right. Montana has implemented a permit process for the allocation of water rights. The permit process is now the exclusive means of acquiring a water right. In Montana, the public, not the appropriator, owns the underlying fee to all of the water in the state and a water right is not a right to possession of a quantity of water, but rather its beneficial use—thus the right is a usufructuary one, which continues only so long as the possession (control) continues. The state regulates changes in purpose, place and ownership of a water right to assure that the public resource is used in the public interest and without injury to other private interests. The effect of public interest criteria legislation recently enacted in Montana requires the state, when issuing permits for large new appropriations (those in excess of 4,000 acre-feet-per-year, and 5.5 cubic feet per second) to give special consideration to public values. Changes in purpose and place of use require legislative approval.

NOTE: MONTANA'S FIRST "WATER CASE" HELD THAT IT WAS NOT JUSTIFIABLE HOMICIDE FOR A MINOR TO SHOOT A MAN WHO STOLE THE MINER'S WATER. TERRITORY V. DRENNAN, 1 MONT. 41, 43 (1868).

NEW MEXICO - ISSUES & DIMENSIONS:

1. *Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?* New Mexico does <u>not</u> appear to regulate wastewater effluent and/or reclaimed water as a use separate from a source of water subject to the water right laws of New Mexico. The holder of an appropriated water right, which results in wastewater effluent and/or reclaimed water, retains the right to beneficially use the effluent, <u>but may be subject to some regulation via a change of use or change in point of diversion..</u>

A. *Is the water regulated as (a) surface, (b) ground water, or ©developed water?* Although not defined, municipal reclaimed water would probably include water originally appropriated from both surface and ground water sources. However, such municipal reclaimed water is not regulated in the sense that traditional surface or groundwater is regulated by New Mexico authorities.[1] Appropriation of ground water is governed by 72-12-7 N.M.S.A and surface waters by 72-5-1 N.M.S.A.

B. *What terms are used to define reclaimed water?* Sewage effluent is water that is left over after having been put to use. Regardless of whether the water used to treat sewage was originally groundwater or surface water, the water remaining after treatment is waste water. In New Mexico, this water is categorized as "Artificial water." Treated sewage effluent is in the same category as water which has drained or seeped or percolated from a treatment plant which "depends for their continuance upon the acts of man." [2]

C. *How are rights to reclaimed water acquired?* Artificial water is not subject to permit by New Mexico.

D. *Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses?* A Permit not required for use of wastewater and/or recycled water.

2. *How do other states interpret the authority and obligations of water rights holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?* New Mexico appears to allow secondary use of wastewater by an original permittee without a separate water right permit for the secondary use.

A. *Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?* In New Mexico (for municipalities) sewage effluent is private water which the City may use or dispose of as it wishes. .[3]

(i) *Do states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use?* Yes. From the case law, it appears that secondary use is allowed based on the premise that effluent water is private, not public water, which is subject to the beneficial use (or reuse) by the owner or developer.

(ii) *Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? Do states restrict reclaimed water to particular manners of use?*

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[1] Appropriation of groundwater is under 72-12-7 N.M.S.A., and surface water under 72-5-1 N.M.S.A.

[2] See Reynolds v. City of Roswell, 99 N.M. 84, 654 P.2d 537, 540 (1982).

[3] See Reynolds v. City of Roswell, 99 N.M. 84, 654 P.2d 537, 540 (1982) "The right of an appropriator to reuse his waste waters has been explicitly recognized in other jurisdictions." (citations omitted).

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New Mexico does not appear to impose extraordinary conditions on permits for secondary uses of reclaimed water.

3. *Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?* For municipalities, New Mexico does not appear to consider the rights and/or interests of third parties who may be affected by a water user's decision to re-use or sell effluent..[4]

A. *Can waster water and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?* Due to New Mexico's policy on hydraulic continuity, return flows are generally pre-obligated under most permits. If artificial water (sewage effluent) were to reach an underground reservoir, it would be deemed to have lost its identity. Such waters become public and would then be subject to appropriation by third parties.[5]

(i) Is the source of water important? Not specifically addressed in New Mexico other than surface - groundwater nexus..

(ii) is the use of imported water by the importer restricted by third party claims? Under New Mexico law, imported water is considered contract water.

(iii) Does equity play a role in determining who is entitled to the use of wastewater? New Mexico law unclear on this issue

4. *Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?* Although New Mexico case law does not articulate this policy, the net result of New Mexico's permitting process and consumptive use doctrine would be to maintain base flows of streams.

5. *How have other states considered the rights of third parties, including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins?* To the extent that the effluent is discharged into a natural stream or water course, the effluent is deemed to be artificial surface water within the meaning of Sec. 72-5-27, N.M.S.A. and appropriators of an artificial flow of water cannot compel a City to continue the supply of water in the absence of a contract, nor can the State

[4] A city 's historic practice of selling a portion and discharging the remainder of its effluent was not questioned. The New Mexico Supreme Court then upheld the city's expressed intent to not dispose of its effluent by selling or otherwise disposing of its effluent other than by its own consumptive use and reuse. Reynolds v. City of Roswell, 99 N.M. 84, 654 P.2d 537 (1982) and see Arizona Public Service Co. v Long, 773 P.2d 988, 1009 (Ariz. 1989).

[5] See 75-11-1 N.M.S.A. and see Brantley v. Carlsbad Irrigation District, 92 N.M. 280, 587 P.2d 427, 429 (1978).

Engineer require a City to continue that supply of water.[6] Note that if the City were to seek a change of place of use or purpose of use, the State Engineer has authority to impose conditions on a City's application for a change in place of use if the proposed change will impair the rights of others.

6. *Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?* Since reclaimed water is considered "artificial water," so long as the reclaimed water is not commingled with natural public waters, the reclaimed water would remain private water. However, once such waters actually reach a water course or underground resevoir, a City has lost control over the water and cannot recapture it. Therefore, before discharge, generators of reclaimed water have special rights to appropriate and divert reclaimed water.

7. *What other re-uses of water may be analytically similar to reuse of potable water effluent?* New Mexico law unclear on this issue.

8. *What issues pertaining to the use of reclaimed water are unique to the particular state?*. New Mexico appears to be unique in its practice of conditioning permits for consumptive and non-consumptive use. Virtually all permits are now conditioned to require a certain percentage of the diversion to be returned to the hydrological basin.

9. *What is the role /authority of Indian Tribes, Bureau of Reclamation, Corps of Engineers, or other Federal laws?* We were unable to ascertain specific reference. Most likely, the federal reserved water rights doctrine; i.e., Winters on reservation treaty rights would apply.

Case Digests

According to the State Engineer, New Mexico case law and the actions of the State Engineer are controlled by:
Reynolds v. City of Roswell, 99 N.M.84, 654 P.2d 537 (1982).

Issue: Whether the State Engineer, in granting a permit for a change in place of use and after determining that the change of place of use will not impair existing rights, may apply conditions which require that sewage effluent resulting from the use of the water must be returned to he Hondo River because the effluent is "public" water and not private water.

Facts: The City of Roswell acquired an Air Force base including its entire water rights. The air base had been granted the right to appropriate 2,500 acre feet of underground water per annum. Although the City initially maintained the base sewage plant, it later piped the sewage to its municipal sewage plant. Treated effluent had been sold to farmers and a

[6] Reynolds v. City of Rosewell, 99 N.M. 84, 86, 654 P.2d 537 (1982).

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country club as well as been discharged directly into the Hondo River. The City then applied for a change in place of use from the air base to the entire City. The State Engineer granted the City's application, but imposed a condition requiring that the City discharge into the Hondo River a certain ratio of sewage effluent at various locations.

The Supreme Court of New Mexico held that the City may take the sewage effluent before it is discharged as waste or drainage water and re-use it for municipal purposes without conditions. The Court reasoned that no appropriator can compel any other appropriator to continue the waste of water which benefits the former. In addition, a municipality should not be hampered by a rule that would always require the sewage to be treated as waste or surplus waters. "Sewage is something which ...must be disposed of in such a way that it will not cause damage to others. It would often be considered the height of efficiency if it could be disposed of in some other manner than by discharging it into a stream.

MONTANA: ISSUES & DIMENSIONS

1. *Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the State?* The State of Montana has the authority to regulate and administer the beneficial use of wastewater effluent. However, sewage effluent is also considered a by-product of municipal use and as a result a City has a right to "dispose" of the same. As long as the effluent is under the guise of "disposal" the effluent would generally not be regulated.

   A. *Is the water regulated as: a) surface water; b) ground water; c) developed water?* "Sewage effluent" is specifically included within the definition of "water" in the Montana water code, and such water can be appropriated.[7] Technically, such effluent is not regulated as surface, ground or developed water.[8]

   B. *What terms are used to define reclaimed water? For example: wastewater, recycled water, etc.* Montana's statute does not specifically reference "reclaimed" water.[9] Sewage effluent falls within the definition of waters of the state. Waste water

[7] See 85-2-102(18): "Water means all waters of the state surface and subsurface regardless of character, or means of occurrence including geo-thermal water, diffuse surface water and **sewage effluent**."

[8] Note: Developed water is restricted to water which is brought up from underground, or drained from non-tributary sloughs or swamps, in essence creating "new " water. For example seepage waters which would not have flowed into a stream, but were collected in a ditch could fall within the definition of developed water.

[9] Waste, drainage and return flow water are referred to in case law, but do not appear to be applicable. The same is true of salvaged water, which requires the use of water saving methods.

generally refers to runoff.[10] Return flow, which is sometimes inadvertently lumped with wastewater, is water which has served its purpose and through evapo-transportation or other means, seeps to ground water and returns to streams. Salvage water is water created by water saving methods.[11]

C. *How are rights to reclaimed water acquired?* Sewage effluent can be appropriated just as any other water of the state. Although sewage effluent can be appropriated, there are cases where a municipalities continued "treatment" effectively interdicts further appropriation..

D. *Is the permit for the use of wastewater, effluent and/or reclaimed water limited to specific uses? For example, surface spreading, wetlands creation, golf courses or industrial uses?* There are some restrictions on the re-use of wastewater effluent and/or reclaimed water. No change of use or place of use of wastewater or effluent would be allowed without express authorization. The general rule appears to be that an original appropriator can intercept and recapture his own waste water with impunity. [12] However, some would argue that recapture and re-use are not changes in appropriation rights, but rather more a new appropriation for which permits must be obtained.[13]

2. *How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?* Montana statutes neither authorize nor prohibit the sale of municipal effluent.. The only clear reference to an appropriator's authority to "sell" water is to surplus created by water saving methods.[14] To sell water in Montana, one must be set up as a water supply company, with prices set by the Public Service commission.

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[10] Waste water can be : 1) water actually wasted or not needed by the claimant; 2) water, after it has served the purpose of the lawful claimant, escapes; and 3) water which from unavoidable causes, escapes from ditches, canals or other works of lawful claimants. See Rock Creek Ditch & Flume Co. v. Miller, 17 P.2d 1074 (1933)

[11] See85-2-419

[12] See Woolman v. Garinger, 1 M 535, 543 (1892), Ryan v. Quinlan 45 M. 521 (1912).

[13] See 85-2-301 to 85-2-314. And See Perkins v. Kramer, 148 M. 355 (1966). Once wastewater water becomes a part of a spring or other tributary flow, which is not seepage and percolating water on the appropriator's land, he cannot intercept and recapture for re-use. In essence this case repudiates the rule developed in Ryan v. Quinlan, that waste water is the personal property of the landowner.

[14] 85-2-419 Salvaged Water, provides: "Sale of the right to salvaged water must be in accordance with 85-2-403," which provides: "The right to use water shall pass with a conveyance of the land or transfer by operation of law, unless specifically exempted therefrom. All transfers of interests in appropriation rights shall be without loss of priority."

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A. *Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?* Montana appears to include the use of wastewater or reclaimed water within the scope of the original water right. The general rule in Montana still appears to be that one can recapture his waste water.

B. *What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc) of the original water right?* To the extent that reclaimed water is used beyond the scope (quantity, place of use, purpose, etc.) of the original water right, Montana law appears to require a change authorization or new water use permit.. [15]

(i) *Do states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use? For example, if the original permit is for municipal use of water, can the permittee recycle the water and use it for surface spreading or industrial use without first obtaining a permit? If so, how?* If a municipality had wastewater, the city could recapture such water. However, sewage effluent may be appropriated. Under certain conditions, Montana law allows the secondary use of wastewater by the original appropriator without a water right permit for the secondary use. The key factors for a municipality in Montana appear to be the following: a) whether the municipality is expanding its beneficial use outside its established boundaries; and b) intent to beneficially use the effluent in a secondary use different from that of treatment of the sewage effluent, which would fall within the original municipal use.[16]

(ii) *Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? Do states restrict reclaimed water to particular manners of use?* Montana does not impose extraordinary conditions on secondary uses of reclaimed water. Montana does require approval for changes in use.[17]

(iii) *Do states restrict the use of reclaimed water to a particular place. For example, is the use of reclaimed water restricted to the same place of use as the water that generated the wastewater?* Montana does appear to somewhat restrict the secondary use of reclaimed water. For example, if a municipality were to attempt to expand its

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[15] See Sec. 85-2-402 Montana Code. See also In the Matter of the Petition for Declaratory Judgment by the City of Deer Lodge, B-No. 97514-76G. Note for any irrigator or municipality which uses water saving methods, this rule would also apply. Section 85-2-419Montana Code Annotated provides: "Any use of the right to salvaged water for any purpose or in any place other than that associated with the original appropriation right must be approved by the department as a change in appropriation right in accordance with 85-2-402."

[16] In the Matter of the Petition for Declaratory Judgement by the City of Deer Lodge, B-No. 97514-76G (June 4, 1996). There the Department of Natural Resources and Conservation (DNRC) established a narrow exception for the *treatment* of sewage effluent, which was inside its established boundaries. In the Matter of Application for Beneficial use Permit No. 19084-s41I by the City of Helena (August 25, 1981), the City applied for a new use permit to beneficially use its sewage effluent for irrigation.

[17] See MCA 85-2-102, and 85-2-402.

beneficial use outside established boundaries (i.e., the City's defined limits) then either a change authorization or new water use permit would be required.

3. *Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?* Montana has considered the rights and interests of third parties. It appears to depend on how a city characterizes its use. [18]A City, in certain circumstances, can treat its water, even totally consume it, without objection or interference by downstream demands for that water.[19]

A. *Can wastewater and/or recycled water be considered within common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?* Waste, drainage and return flow waters may be appropriated by a lower appropriator from a watercourse or drain ditch.[20] However, in most cases, such an appropriator cannot compel his source to continue to have waste, or to continue the use which produces drainage or return flow.[21]

(i) *Is the source of the water important?* The source of water may be important. For example, if the source of supply were waters derived from a separate drainage basin . An importer of water does not own the corpus of the water, but only the right to beneficially use the same. (usufructory right). The general rule is an importer of water into a new drainage basin has only the interest in the water that is typical of any appropriator (the measure of the water right parallels the needs as reflected by beneficial use).

(ii) *Is the use of imported water by the importer restricted by third party claims?* As to imported water, the importer should establish the purpose and extent of his appropriation and use the time of bringing in the alien water. Older Montana cases have held that once the appropriator's use is established, the needs for that

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[18] For example, the City of Helena discharged its effluent and downstream irrigators who utilized the discharge were deemed to have had a right to such discharge. In the Matter of the Application for Beneficial Use Permit No. 19084-s411 by the City of Helena (Final Order.)

[19] In the Matter of the Petition for Declaratory Judgment by the City of Deer Lodge, B-No. 97514-76G, June 4, 1996 p. 9). There, the Montana Department of Natural Resource s and Conservation analyzed the City of Deer Lodge's sewage effluent in terms of whether the treatment of sewage effluent fell within the City's municipal use. The DNRC then ruled that as part of its municipal right, the City could treat the water and totally consume it without objection or interference by downstream demands for the water.

[20] Willis v. Morris, 100 M. 514 (1935); Newton v. Weiler, 87 M. 164 (1930) See also Montana Water Law for the 1980's, Al Stone ( ).

[21] Newton v. Weiler, 87 M. 164 (1930); Popham v. Halioran, 84 M. 442 (1929); Bower v. Big Horn Canal Co., 307 P.2d 593 (Wyo. 1957); Galiger v. McNulty, 80 M. 339 (1927). Note there is some question as to whether an appropriator has a right to recapture his return flows and thus the rights of third party appropriators may be more compelling when such return flows are no longer available. See for example the City of Helena case.

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use are the upper limits of the appropriator's right.[22] Current law requires any changes in any appropriation (place of use, point of diversion or purpose of use) require permission of the Department of Natural Resources and Conservation, which will not be granted if others will be adversely affected.[23]

(iii) *Does equity play a role in determining who is entitled to the use of wastewater? For example, does the party that incurs the labor and expense have a superior right to the water against third party claims?* Equity may or may not play a role. Generally when waters that would not in the normal course of events be available for use in a particular basin are made available by the exertions of man, such waters assume the status of "developed" water and the exclusive use belongs to the person whose efforts have contributed to this supply.[24]

4. *Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?* We have been unable to find any cases which specifically address the impact of a decision to use or sell effluent or reclaimed water on overall water availability.

   A. *Does the introduction of wastewater and/or reclaimed water into a natural stream system, which then increases the volume of the natural stream, then become a part of the natural stream by entry therein?* Under Montana law, once wastewater and/or reclaimed water were introduced into a natural stream, then such wastewater and/or effluent would revert to public waters, which would be subject to appropriation by a 3rd party. The only exception to this general rule, would be if an appropriator were to temporarily use the channel as a conduit, but were to continuously exert control over the water.

   B. *Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?* Once an appropriator relinquishes control of his wastewater or recycled water, he is no longer beneficially using the water.

      (i) *Is permit necessary for instream uses of waste water and/or recycled water?* N/A

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[22] Cahrow v. Huffine, 48 M. 437 (1914) and see Rock Creek Dictch and Flume Co. v. Miller, 93 M. 248 (1933)

[23] See 85-2-402. Some commentators argue that additional uses of water by means of recapture and re-use would seem to be more of the character of new appropriations for which permits must be obtained under sections 85-2-301 through 85-2-314 Montana Code Annotated.

[24] Smits v. Duff, 39 Mont. 832, 102 P. 984 (1909). Rock Creek Ditch & Flume Co. v Miller, 93 Mont. 248, 17 P.2d 1074 (1933).

5. *Have other states considered the rights of third parties including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins.*? Unlike most western states, Montana does not impute ownership of water to the importer. Waters that augment a new drainage basin and become part of the natural stream may not necessarily be reclaimed. A subsequent right to the use of such water, by a third party, is possible once it is beyond the control of the original appropriator.[25]

6. *Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?* Unclear under Montana law.

7. *What other re-uses of water may be analytically similar to reuse of potable water effluent?* We have been unable to find any case law on this issue.
8. *What issues pertaining to the use of reclaimed water are unique to the particular state?* For municipalities, Montana provides for a reservation of water for future use.

9. *What is the role/authority of Indian Tribes, Bureau of Reclamation, Corps of Engineers, or other Federal Laws?* Winters doctrine applies. In addition, under an unusual theory of "comity" apparently the Corps of Engineers has made a claim for a water right to a reservoir, which embraces some 40 million acre feet of water.

Case Digest:

1. In the Matter of the Petition for Declaratory Judgment by the City of Deer Lodge, B-No. 97514-76G. (Quasi-judicial Administrative Proceeding)

Issue of first impression in Montana. Whether downstream users have a right to the continued discharge of the City of Deer Lodge sewage effluent into the Clark Fork River.

The City of Deer Lodge, which had historically discharged its sewage effluent into the Clark Fork River, sought confirmation that the city did not need administrative approval from the Montana Department of natural Resources and Conservation (DNRC) before proceeding to implement its plan of sewage effluent land application and cease discharge of effluent in order to cut down on pollution in the river and to meet water quality requirements.

The DNRC held that treatment of sewage effluent was within the City of Deer Lodge's existing municipal water right, and that downstream appropriators did not have a right to the continued discharge of the effluent. The DNRC clarified that City of Deer Lodge could treat the effluent but only within its municipal boundaries. Any new beneficial use of municipal water or sewage effluent outside the City's defined limits "requires a change authorization or

[25] See Rock Creek Ditch & Flume Co. v Miller, 93 Mont. 248, 17 P.2d 1074 (1933). And See In the Mater of the application for Beneficial Water Use Permit No. 19084-s411 by the city of Helena.

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new water use permit.." The DNRC acknowledged, but did not rely on, the general principal that a downstream appropriator does not have the right to insist on continuation of waste or seepage water. Rather than analyzing the city of Deer Lodge's sewage effluent in terms of whether it is return flow or waste in regard to the rights of downstream appropriators, the DNRC reasoned that the City was not actually intending to put the effluent to a new beneficial use outside the city limits in the usual sense, but simply wants to treat it and get rid of it without creating a nuisance.

2. In the Matter of the Application for Beneficial Water Use Permit No. 19084-s411 by the City of Helena. (Final Order).

Issue: Whether the City of Helena could reclaim its wastewater effluent.

The City of Helena applied for Beneficial use water permit for new sprinkler irrigation. The proposed source of supply for this new permit was sewage effluent from the Helena Sewer Treatment Plant. The permit, if issued, would have a priority date of 1978. Objectors included a downstream user who alleged that the City's source of water was required to fulfill his full appropriation. He and other appropriators who had utilized the effluent, had historically used the effluent since 1973

The Court held that the City of Helena failed to show that unappropriated water exists in the source of supply. Waters accruing from the Helena treatment plant in the form of sewage effluent had already been appropriated by downstream users. The court noted that generally, when waters not available in the normal course, are made available by the exertions of man, such waters generally belong to the person whose labors have so contributed to the supply. However, in this case, applicant had a relatively non-consumptive use. Since an importer of water has only a usufructuary interest in what he beneficially uses, once the water drains outside of his control, he no longer had jurisdiction over such waters.

2. Rock Creek Ditch & Flume Co. v.Miller, 93 Mont. 248, 17 P2d 1074 (1933).

Issue: Whether, after irrigation, water which percolates though a stockholder's land and contributed to the flow of Rock Creek can then be reclaimed or recaptured for the use and benefit of the stockholders.

Plaintiff corporation constructed a ditch seven miles long between two watersheds, the Rock creek and Trout creek basins, where plaintiff sold water conveyed by the ditch to its stockholders for irrigation. Plaintiff's theory was that by bringing Rock Creek water into the Trout creek watershed, it created a new source of supply and after using the water for irrigation, could recapture the excess for the use and benefit of its stockholders.

The Court held that the waters that augmented the new drainage basin by percolation mingled with the soil and became part of the stream. A subsequent right to the use of such water, as much of it as returns to the creek, may be acquired. Defendant had in fact put such waters to use beneficial use. Thus the plaintiff could not reclaim such water. The court characterized such trans-basin diversions as yielding nothing more than the typical usufructory interest and the

importer did not own the corpus of the water but only the right to use the same for some defined purpose.

The court reiterated the general rule, that the owner of the right to use the water—his private property, while in his possession—may collect it, recapture it, before it leaves his possession, but after it gets beyond his control it thus becomes waste and is subject to appropriation by another.

The court characterized the water as waste, which it defined as a) water that is no longer needed; b) water which after beneficial use escapes; and c) water which from unavoidable causes, escapes from ditches, canals or other works.

1.Ryan v. Quinlan, 45 Mont. 521, 134 P. 512 (1912).

Established a general rule that percolating (subterranean) water is not governed by the same rules applied to a running stream. Underground water was so diverse and uncertain that the Court could not subject it to regulation. Thus, the owner of land where such water is found has the right to control and use it as he pleases for the purpose of improving his own land, even though his use or control may injure an adjoining proprietor.

1.Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966).

Issue: Whether plaintiff established a sufficient degree of control over seepage waters to establish an appropriative right to the water, even to the detriment of other appropriators.

Beginning in 1908, respondent diverted water from the forks of Dempsey Creek and conveyed it through ditches to natural depressions or "potholes" located on the plateau. The potholes were filled during the winter and spring runoff when not needed for irrigation. During the summer months, water percolated four to eight hundred feet below the potholes. This water was collected in ditches constructed by respondent parallel to the creek. The same amount of water was then diverted by respondent further downstream where the land was suitable for irrigation.

The Court held that respondent failed to prove that he retained any actual control over the water after he placed it in potholes. If plaintiff could show that by his system of storing water he can irrigate some of his land with waters which otherwise would run to waste and without injury to anyone, he would be entitled to appropriate the same. The Court noted that at most he proved he had a reservoir composed of surface water and groundwater, in undetermined quantities, and that the reservoir leaked into Dempsey Creek.

The court reiterated the general rule that the owner of the right to use the water—his private property while in his possession, may collect it, recapture it, before it leaves his possession, but after it gets

beyond his control, it becomes waste and is subject to appropriation by others. However, the court noted that "traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists. Recent technology enabled one to prove the identify of groundwater. Unless respondent were able to prove the identity of the seepage and "pothole" water, he would not be entitled to an appropriative right to water so developed.

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A Survey of Reclaimed Water Rights For the State of Montana

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

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Preston Gates and Ellis

II. WATER RIGHTS PERTAINING TO RECLAIMED WATER IN MONTANA.

A. General Statement.

B. Answers to Issues and Dimensions.

1. Does Montana regulate and administer the beneficial use of waste water effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?

Waste water is reviewed according to the Water Use Code, MCA 85-1-101, and the common law doctrine of prior appropriation. Cases which discuss the common law are listed in the appendix to this section. Waste water is subject to the water rights laws of the state, but currently, specific legislation pertaining to waste water effluent or reclaimed water does not exist in Montana.

The Water Use Code does not specifically refer to waste water, sewage effluent, reclaimed water, etc. However, sections of the code reflect a desire on the part of the legislature that the use of water conservation techniques such as reclaiming water are to be encouraged. For example, the policy section calls for the state's water resources to be put to "optimum beneficial use and not wasted." MCA 85-1-101(1). It also commands the Department of Natural Resources and Conservation (DNRC) to "coordinate the development and use of the water resources of the state so as to effect full utilization, conservation, and protection of its water resources." MCA 85-1-101(3). Further, the provisions of the code are to be liberally interpreted. MCA 85-1-103

The rights to sewage effluent, reclaimed water, etc., are viewed in the same regard as any other water right. To appropriate a right to water, a person must demonstrate that the appropriation will a) not adversely effect the water rights of another; and b) the water will be put to a beneficial use. MCA 85-2-402(2). This is the modern version of the prior appropriations doctrine (the ancient version did not require a beneficial use), which

basically states that water rights are predicated on the notion of "first in time, first in right." MCA 85-2-401.

The water rights conflict over reclaimed water and reuse of sewage effluent arises in situations where another appropriator had been making use of the waste water before the conservation efforts were put into place.

In *Rock Creek Ditch & Flume Co. v. Miller,* the plaintiff was a corporation that supplied water to area farmers via a seven mile canal it had constructed. . 17 P.2d 1074, 1075 (1933). After being used for irrigation, the water seeped in to the land, and created a small creek. *Id.* Defendant diverted the water from the creek for use on his lands. *Id.* Plaintiff then sued, claiming that it owned the water that defendant was using since its canal had brought the water that created the creek. *Id.* The Court found that the general rule is that the owner of the right to use the water, which is his private property while in his possession, may collect it, and recapture it, before it leaves his possession, but after it gets beyond his control, it becomes waste and is subject to appropriation by another. *Id.* at 1080.

However, even if a water right is based upon the waste of upstream appropriators, a downstream appropriator cannot insist that an upstream appropriator continue to waste at the level that he has traditionally. *Newton v. Weiler,* 87 Mont. 164, 286 P. 133, 139 (1930); *Popham v. Holloron,* 84 Mont. 442, 275 P. 1099, 1102 (1929).

In sum, the right to waste water is regulated in the same manner as any other water right. Water rights are subject to the prior appropriation doctrine, which states that the first to appropriate holds the right. However, legally appropriated water becomes the personal property of the appropriator until it is allowed to escape his property. Therefore, the appropriator can re-use the water until it leaves his property. Also, a downstream appropriator may not force an upstream appropriator to continue to waste water at the level he has traditionally.

A. Is the water regulated as:

(a) Surface water;

(b) Ground water;

(c) Developed water?

The answer depends on how and where the effluent is captured.

Surface water: The discussion in the above section applies.

Ground water: The appropriator has the right to that which is on his land. *Rock Creek,* at 1077; *Ryan v. Quinlan,* 45 Mont. 521, 124 P. 512, 515.

Developed water: "When an appropriation is made of the water of a stream, the rights of the appropriator are limited to the natural condition of the stream at the time the appropriation is made, and he has no interest in improvements subsequently made which increase the supply of water flowing in it. Therefore, if by his own exertions another increases the available supply of water in the stream, he has a right to appropriate and use it to the extent of the increase." *Rock Creek* at 1078; *also citing State ex rel. Zosel v. District Court,* 56 Mont. 578, 185 P. 1112.

B. What terms are used to define reclaimed water?

Reclaimed water: Reclaimed water is viewed under the law as any other type of water. There is no specific definition for reclaimed water.

Waste water: According to *Rock Creek,* waste water may have three meanings:

(1) water that is actually wasted or not needed by the claimant thereto;

(2) water which after it has served the purpose of the lawful claimant thereto, has been permitted to run to waste or escape;

(3) water which from unavoidable causes, escapes from the ditches, canals, or other works of the lawful claimants. *Rock Creek* at 1077.

Salvaged water: See 85-2-102. Does not really have to do with reclaimed water, but inserted to avoid confusion.

Sewage effluent: The DNRC balked at the opportunity to legally define sewage effluent. *In the Matter of the Petition for Declaratory Judgment By the City of Deer Lodge*, B-No. 975144-76G, p. 8-9 (June, 1996). The relevant portion of the Order states,

> "How sewage effluent is defined legally is important because different legal implications follow from each definition. A downstream appropriator has the right to insist on continued return flow, but does not have the right to insist on the continuation of waste or seepage water. . . . Clearly, sewage effluent and how it fits into water law has given courts much trouble with no clear consensus as to how it should be considered.
>
> Rather than analyzing the City of Deer Lodge's sewage effluent in terms of whether it is return flow or waste in regard to the rights of downstream appropriators, the DNRC finds it is better analyzed in terms of whether the treatment of sewage effluent falls within the City of Deer Lodge's municipal use."

The Order goes on to say that the municipalities have the right to totally consume their sewage effluent, without objection or interference by downstream demands for that water. Order, p. 10. Thus the strong suggestion is that sewage effluent should be viewed as waste or seepage water rather than return flow.

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?

The right is acquired as any other water right under state law. The appropriations procedures for Montana are codified in MCA 85-2-310 & 311.

D. Is the permit for the use of waste water effleuent and/or reclaimed water limited to specific uses?

The use must be beneficial, and not effect the water rights of prior appropriators. MCA 85-2-311.

2. How does Montana interpret the authority and obligations of water right holders to use or sell waste water effluent or reclaimed water derived from the water right holder's first use of water?

A. Does Montana law expressly include or exclude the use of waste water or reclaimed water within the scope of an original water right? If so, how?

Waste water is the personal property of the appropriator until it is abandoned. *Rock Creek* at 1080. Once abandoned, the water right ceases, and anyone may appropriate the water through the proper procedures. *79 Ranch, Inc., v. Pitsch,* 666 P.2d 215, 217 (1983). However, a person cannot be forced to continue to waste water. *Newton, supra; Popham, supra.*

B. What authority or role does Montana have for the use of reclaimed water to the extent its use is beyond the scope of the original water right?

(i) Does Montana allow the secondary use of waste water and/or recycled water by the original permittee without a water right permit for the secondary use?

Not usually. When a water user changes the place of use of the water right, a change authorization from the DNRC is requires. MCA 85-2-102(4) & 402. However, the municipality of Deer Lodge did not need a new permit to merely treat its sewage before releasing it, even though they were releasing it into a different stream. The key is whether the person is intending to put the water to a beneficial use, or is merely intending to abandon it in another area.

(ii) Does Montana impose extraordinary conditions on permits for secondary uses of reclaimed water, i.e., does Montana restrict reclaimed water to particular manners of use?

The restriction is the same for any other water right. It must be for a beneficial use, and must not violate the rights of other appropriators.

(iii) Does Montana restrict the use of reclaimed water to a particular place. For example, is the use of reclaimed water restricted to the same place of use as the water that generated the waste water?

There are no such restrictions, but there are related provisions. A person must apply for a change in appropriation rights in order to sell water out of state. MCA 85-2-402(6). Surplus water must be used or sold. MCA 85-2-415. However, the purchaser of that water may not re-sell it. MCA 85-2-418.

3. Under what circumstances, if any, has Montana considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?

If abandoned, third parties may appropriate the water, but an upstream appropriator cannot be forced to continue to waste.

4. Under what circumstances, if any, has Montana considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?

The waste water is viewed as belonging to the public once it has been released into a natural stream. *Rock Creek* at 1076. However, if a person, by his own efforts, increases the available supply of water in a stream, he has the right to use the excess which he created. *Rock Creek* at 1078.

5. How has Montana considered the rights of third parties, including other water users, when these third parties are benefited by waste water discharges created from the use of water which has been imported from other basins?

A. Is waste water, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?

The person that brings the water over has the right to appropriate the water for whatever beneficial use he can put it to. *Rock Creek* at 1078.

6. **Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged ground water or augmented surface flows that derive from the use of reclaimed water for these purposes?**

I have not found any legal authority to support an argument for such special rights in Montana. The same common law rule that the person that brings the water to increase the surface flows has the right to use that increase seems pertinent here.

A Survey of Reclaimed Water Rights For the State of California

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

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California Water Reuse Law

Summary

Regulation of Recycled and/or Reclaimed Water

The State of California has comprehensive water laws and regulations addressing water rights, water use, and water reuse. In fact, over 90 statutes have been enacted by the California legislature pertaining to the use and allocation of water, both virgin and reclaimed. California's emphasis on water reuse and recovery was initiated over twenty years ago when it became apparent that population, industrial, and agricultural growth would soon far exceed the water resources available. More recently, severe droughts have stimulated the enactment of additional policies encouraging the reuse of water. The numerous provisions added to the Water Code over the years encourage the use of reclaimed water whenever possible and disfavor the use of potable or virgin water for applications better served by reclaimed water.

California recognizes that "reclaimed" or "recycled" water is a valuable resource and regulates it as such. For example, "reclaimed or "recycled" water is defined as water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is, therefore, considered a valuable resource. Cal. Water Code. §13050(n). Additionally, the state has adopted goals for the beneficial reuse of water. Their goal is to beneficially reuse 700,000 acre-feet of water per year by the year 2000 and 1 million acre-feet per year by 2010. Water Recycling Act of 1991, Cal. Water Code §13577.

The state's focus on the beneficial use of water and prevention of waste is due in part to the state's reasonable use doctrine. Article X, § 2, of the California Constitution directs the state to put all of its water resources to beneficial use to the fullest extent possible and to prevent the waste or unreasonable use of water. To this end, water rights are to be limited to only "such water as shall be reasonably required for the beneficial use to be served, ... [however] such right does not and shall not extend to the waste or unreasonable use [of the water.]" Cal. const. art. X, § 2.

Acquisition of Rights to Reclaimed Water

Rights to reclaimed water are established in part by regulation. The Water Reclamation Law authorizes any water supplier in the state to acquire, store, provide, sell, and deliver reclaimed water for beneficial use. Cal. Water Code §13556. Thus, a water supplier may obtain water rights in reclaimed water. This can be done contractually with the owner of the original water right or a waste treatment plant owner or through the regular water right permitting process.

The right of a water supplier does not extend to reclamation of water once it has been deemed a waste and sent to a treatment plant. The Water Reclamation Law provides that the owner of a wastewater treatment plant has a right to wastewater from the plant that is superior to anyone who has supplied the water discharged into the system, unless there is an agreement otherwise.

Cal. Water Code §1210. However, the treatment plant operator has an obligation not to adversely impact the water rights of any "legal user" of the reclaimed water. *Id.*

The appropriation of reclaimed water also depends whether it is a return flow and on its status as "used" or "foreign" water. Water which has not been returned to a natural water body and is in control of the original appropriator can be reused by the appropriator in the same general area without obtaining a permit or being subject to appropriation by other parties. On the other hand, return flow which has re-entered a natural stream is considered unappropriated water. Cal. Water Code §1202(d). If the water was removed from a watershed and returned to the same watershed it is "used" water and is subject to claims of appropriative and riparian water right holders downstream. Return flows of "used" water can not be recaptured by the original appropriator once they have been released. Eddy v. Simpson, 3 Cal. 249 (1853). "Foreign" water, that which was imported from another area, however, is not subject to claims by downstream water right holders and may be recaptured by the importer, so long as the waters have to been abandoned. See Los Angeles v. City of San Fernando, 14 Cal.3d 199, 537 P.2d 1250 (1975). Groundwater and water which has been removed from a stream and stored are also considered "foreign" waters and are not subject to appropriation as such.

As noted above, the wastewater treatment operator has rights above all others in the discharges from the plant to the extent that they do not impact the rights of other "legal users" of the water. Fish and wildlife may be considered downstream users of the water with legal rights to the water. The use of discharged water to enhance fish and wildlife is considered a beneficial and reasonable use of water. Therefore, in a petition to change the point of discharge of wastewater, the State Water Resources Control Board must consider the use of the water to enhance the natural environment and the effect that removing the flows will have before it permits the redirection of all or part of the prior discharge.

Issues and Dimensions

1. *Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the State:*

California has extensive regulations addressing water rights, water use, and water reuse. Numerous provision have been added to the Water Code to encourage the use of reclaimed water whenever possible and to disfavor the use of potable water for applications better served by reclaimed water. To this end, the regulations contain provisions for the acquisition of rights to reclaimed water.

A. *Is the water regulated as: Surface; Ground; or Developed water?*

California regulates "reclaimed" or "recycled" water. The state defines "reclaimed or "recycled" water as water which, as a result of treatment of waste, is suitable for a direct beneficial use or a controlled use that would not otherwise occur and is, therefore, considered a valuable resource. Cal. Water Code. §13050(n). Thus, the regulation of reclaimed water is as treated waste water or developed water

California makes a further distinction between "used water," that is, unappropriated return flows to a stream, lake or other body of water in the same watershed as that which it had been appropriated, and "foreign water," that is, water appropriated from one watershed which is discharged into another. Cal. Water Code. §1202(d).

B. *What terms are used to define reclaimed water? For example: wastewater, recycled water, etc.*

Reclaimed water is referred to in the regulations as "reclaimed" or "recycled" water. These are defined as treated wastewater suitable for a direct beneficial use. Cal. Water Code. §13050(n).

C. *How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?*

Right of Water Suppliers: Rights to reclaimed water are established in part by regulation. The Water Reclamation Law authorizes any water supplier in the state to acquire, store, provide, sell, and deliver reclaimed water for beneficial use. Cal. Water Code §13556. Thus, a water supplier may obtain water rights in reclaimed water. This can be done contractually with the owner of the original water right or a waste treatment plant owner or through the regular water right permitting process.

The appropriation of reclaimed water also depends whether it is a return flow and on its status as "used" or "foreign" water. Water which has not been returned to a natural water body and is in control of the original appropriator can be reused by the appropriator in the same general area without obtaining a permit or being subject to appropriation by other parties. On the other hand, return flow which has re-entered a natural stream is considered unappropriated water. Cal. Water Code §1202(d). If the water was removed from a watershed and returned to the same watershed it is "used" water and is subject to claims of appropriative and riparian water right holders downstream. Return flows of "used" water can not be recaptured by the original appropriator once they have been release. Eddy v. Simpson, 3 Cal. 249 (1853). "Foreign" water, that which was imported from another area, however, is not subject to claims by downstream water right holders and may be recaptured by the importer, so long as the waters have to been abandoned. See Los Angeles v. City of San Fernando, 14 Cal.3d 199, 537 P.2d 1250 (1975)

After the water has been discharged, or abandoned, downstream users may obtain permits to appropriate the discharged water. This water right is a lesser right than that of the a discharger of "foreign" water, for if the discharger decides to cease the discharge, the downstream user has no right to compel the continuation of the discharge. Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 90 P.2d 58 (1939). To ensure that downstream appropriators are aware of this limitation, each permit contains a general permit term stating : "[to] the extent that water available for use under this permit is return flow, imported water, or wastewater, this permit shall not be construed as giving assurance that such supply will continue."

Right of Treatment Plant Operators: The right of a water supplier does not extend to reclamation of water once it has been deemed a waste and sent to a treatment plant. The Water Reclamation Law provides that the owner of a wastewater treatment plant has a right to wastewater from the plant that is superior to anyone who has supplied the water discharged into the system, unless there is an agreement otherwise. Cal. Water Code §1210. However, the treatment plant operator has an obligation not to adversely impact the water rights of any "legal user" of the reclaimed water. Id. This provision may restrict the ability of a treatment plant operator to redirect flows which had previously been discharged to a water course.

If the waste treatment plant has introduced the water into a watercourse for the purpose of maintaining or enhancing fishery, wildlife, recreational or other instream beneficial uses, the state will not grant any permits or licenses to others to use the water. Holders of existing water rights also may not use or claim such water. Cal. Water Code. §1212.

If a wastewater treatment plant decides to reclaim and reuse its discharge, it must first petition the State Water Resources Control Board ("SWRCB"). Cal. Water

Code §1211. The Water Board must determine that the redirection of discharge will not adversely impact any other "legal user" of the water. In making this determination the SWRCB reviews such factors as the rights of other users of the water to determine the priority of their claims, and the extent to which the water discharged is foreign or used.

Rights to Reclaimed Groundwater: Groundwater in California is considered legally distinct from surface waters. Cal Water Code §2500. Downstream appropriators of surface water fed with reclaimed groundwater can not claim a right to such water. Los Angeles v. Glendale, 23 Cal. 2d 68 (1943). Therefore, treatment plant operators who seek to reuse wastewater derived from groundwater have very few restrictions on their use of such water.

D. *Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses? For example: surface spreading, wetlands creation, golf courses, or industrial uses.*

A treatment plant operator must obtain approval from the SWRCB prior to changing the point of discharge, place of use, or purpose of the wastewater treatment effluent. Cal. Water Code §1211. The SWRCB may require the operator to limit the use of reclaimed water to specific uses. Additionally different permit conditions, regarding water quality, must be included in the permit for different uses of reclaimed water. Cal. Code §§60303-60320.

The state also regulates the use of "virgin" water. Certain uses of water have been designated by the legislature as waste or unreasonable uses of water and use of virgin water for these purposes is a violation if reclaimed water is available for use. See, e.g. Cal. Water Code §13550 (Prohibition and limitation of the use of potable water for non potable uses); §13551 (industrial and irrigation uses); §13552.2 (irrigation of residential landscaping); §13552.6 (floor trap priming, cooling towers, air conditioning devices); §13553 (toilet flushing in non-residential structures).

2. *How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?*

An importer of water has the right to reclaim the water which was imported from another water system, Los Angeles v. City of San Fernando, 14 Cal. 3d. 199, 537 P.2d 1250 (1975); however, if the water has entered a waste treatment plant, the waste treatment plant operator has superior right to the water, barring any contractual right to the importer. Cal. Water Code § 1210.

Additionally, water which has not been returned to a natural water body and is in control of the original appropriator can be reused by the appropriator in the same general area without obtaining a permit or being subject to appropriation by other parties.

If the water is returned to the stream, the ownership of the water depends on whether or not it has been imported. Imported water can be reclaimed by the original water right holder as long as it has not been "abandoned" or sent to a waste treatment plant. If the water comes from the same watershed, however, and is merely "used" water, the original appropriator may have limitations on the reuse of water, if the reuse results in impacting the water rights of downstream appropriators of the water. Cal. Water Code § 1202(d); Barbara J. Leidigh, *Sacramento Water Reclamation Project*, Op. Off. Chief Counsel, (November 22, 1993).

A. *Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?*

To obtain a water right, the use proposed for the water must be an beneficial use and must not be unreasonable or a waste of water. Water rights won't be issued to uses that would be better served by reclaimed water. Cal. Water Code §13550. Water right permit holders are required to report periodically on the potential to use reclaimed water for all or part of their needs. See Cal. Code. Regs. Tit. 23 §848. The SWRCB, when acting on a water right application, may reduce the water requested and require the applicant to adopt a water reclamation program, Cal. Code Regs, Tit. 23 §780.

When a water right is issued to an appropriator, the permit will often contain a provision which clarifies that the permit does not give the permitee a right against any upstream party seeking to reclaim its discharge into the stream. The permit term states: "[to] the extent that water available for use under this permit is return flow, imported water, or wastewater, this permit shall not be construed as giving any assurance that such supply will continue."

B. *What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?*

The California Constitution sets out a reasonable use doctrine for water. It provides that the water resources of the state shall be put into the maximum beneficial use possible and that the use must not be unreasonable or a waste of water. Cal. const. art. X, §2. This rule of reasonable use has been interpreted as an authorization to modify established water rights. Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489, 45 P.2d 972 (1935). The water reuse mandate set out in Cal. Water Code §§ 13550-13556, extends the

doctrine of reasonable use to reclaimed water. Thus the State Water Board can conduct proceedings to adjudicate claims of waste or unreasonable use of water, both virgin and reclaimed. The SWRCB may modify a water rights permit if the use of fresh water is found to be unreasonable and force the water rights holder to use reclaimed water instead. Cal. Water Code §13550.

When a water right holder plans to reclaim its water for a use outside the water rights permit, it must report to the Regional Water Board. The Regional Water Board will establish water quality limitations for the use and may issue a master reclamation permit to the supplier or the user of the reclaimed water. Cal. Water Code §13523.1.

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right for the secondary use?

The holder of a water right may reclaim water and put it to a secondary use without obtaining a water right permit for the secondary use, if the water was imported to the area and considered "foreign" water. However, a supplier seeking to reuse water must report to the Regional Water Board and may be required to obtain a master reclamation permit. Cal. Water Code §§ 13550-13556.

While a water right permit is not required, the staff counsel recommended in 1984, that treatment plants or users of reclaimed water obtain permits to appropriate the water, in addition to approval from the SWRCB, before initiating a use of reclaimed water. M.G. Taylor, *Implementation of Water Code Section 1210 et seq.*, Op. Off. Chief Counsel (July 6, 1984). However, a recent letter from the SWRCB to a city seeking a permit to appropriate its wastewater treatment plant effluent suggests that the Board does not have jurisdiction to issue a permit so long as the reclaimed water is never diverted to a natural watercourse. The Board suggests that reuse of wastewater requires merely the approval from the State Board under Cal Water Code §1211. Letter from Roger Johnson Assistant Division Chief, Division of Water Rights, State Water Resources Control Board, to Andrew Hitchings, DeCuir & Somach, Attn'y for the City of Roseville. (Oct. 13, 1994). A similar determination was made regarding the Sacramento Regional County Sanitation District's request to appropriate its wastewater.

(ii) Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? Do states restrict reclaimed water to particular manners of use?

The state does not restrict reclaimed water to particular uses, but does have varying water quality standards for different uses of water. These standards

are developed and adopted by Regional Water Boards and the State Department of Health Services. A water supplier seeking to use reclaimed water must also file certain reports with the Regional Water Board. The Regional Board will typically require the supplier to comply with water quality guidelines issued as waste discharge requirements under Cal. Water Code §13263, or water reclamation requirements under Cal. Water Code §13523 or issue a master reclamation permit under Cal. Water Code §13523.1.

(iii) Do states restrict the use of reclaimed water to a particular place.

California may restrict the use of reclaimed water to particular places in the reclaimed water permit. The application for a water right permit must include information about the use of the water. The permit may then be limited to that use.

When a wastewater treatment plant seeks to reclaim its effluent, it must apply to the SWRCB for the change. The Water Board will look at a variety of factors to determine if the change in use of the water is beneficial and not a waste and ensure that the change does not interfere with the rights of other "legal users" of the water. Cal. Water Code §1211.

3. *Under what circumstances, if any, have states considered the rights or interest of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?*

See discussion below.

A. Can wastewater and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?

Third parties may make appropriations of wastewater and/or recycled water under the return flow doctrine. Once water has been returned to a stream it is abandoned and is no longer considered appropriated. Another party may then appropriate the water. However, if the water released is "foreign" to the watershed, the appropriator only receives title to the water that has been released by the prior appropriator. The initial holder of the water does not lose its water right. The initial owner of the right may cease to abandon the water at any time and the downstream appropriators can not compel the water right holder to continue the discharge. Stevens v.Oakdale Irrigation Dist., 13 Cal.2d 343, 90 P.2d 58 (1939).

(i) *Is the source of water important?*

Yes, the origin of water is important in determining the right to reuse water which was previously discharged to a stream. If water is taken out of a water course by a user and is returned to the same water course, it is designated as "used" water and is subject to appropriation by downstream users. Cal. Water Code §1202(d). On the other hand, water "imported" from some other water system is considered "foreign" water which may be recaptured and reused by the importer, as long as the water has not been abandoned. Stevens v. Oakdale Irrigation Dist., 13 Cal.2d 343, 90 P.2d 58 (1939).

Downstream appropriators of "foreign" water have lesser rights than the original discharger who can cease the discharge at any time. Stevens v. Oakdale Irrigation Dist., 13 Cal.2d 343, 90 P.2d 58 (1939).

(ii) *Is the use of imported water by the importer restricted by third party claims?*

Importers may recapture water that they import from another water system. Los Angeles v. San Fernando, 14 Cal. 3d. 199, 537 P.2d 1250 (1975). Downstream appropriators of "foreign" water are not considered "legal users" of the water and can not claim harm from the reuse or reclamation of upstream discharges. Stevens v. Oakdale Irrigation Dist., 13 Cal.2d 343, 90 P.2d 58 (1939). In fact, water appropriation permits for downstream users of water, often contain a provision which clarifies that the permit does not, in itself, give the permittee a right against a party discharging upstream who may cease to discharge the water to the water course in the future.

(iii) *Does equity play a role in determining who is entitled to the use of wastewater? For example, does the party that incurs the labor and expense have a superior right to the water against third party claims?*

No, the rights to reuse wastewater are established by statute. The wastewater treatment plant has superior rights to all as long as the reuse of the water does not impact other "legal users" of the water. It is very difficult to establish a claim as a legal user of wastewater. A downstream appropriator or holder of a riparian right may be a "legal user" of the wastewater to the extent that the wastewater is considered "used." If the wastewater is foreign to the water body, the treatment plant owner has superior rights.

4. *Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?*

See discussion below.

A. *Does the introduction of wastewater, into a natural stream system, which then increases the volume of the natural stream, then become part of the natural stream by entry therein?*

No, if the water is considered foreign water, the water discharged does not become "part" of the stream. However, use of discharged water to enhance fish and wildlife is considered a beneficial and reasonable use of water. Additionally, fish and wildlife may be considered downstream users of the water with "legal rights" to the water. State Water Resources Control Board, Order WR 95-6: In the Matter of Treated Waste Water Change Petition WW-20 of El Dorado Irrigation District. In this case the petition to reclaim water discharged from a wastewater treatment plant was limited to only such water which was not needed for the in-stream beneficial use of promoting fish and wildlife.

B. *Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?*

Yes, the SWRCB established the enhancement of instream uses such as fish, wildlife, recreation and aesthetics as beneficial uses of reclaimed water. SWRCB Resolution No. 77-1, *Policy With Respect to Water Reclamation in California;* see also Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, 26 Cal. 3d 183, 605 P.2d 1 (1986).

(i) *Is a permit necessary for instream uses of waste water or recycled water?*

If the waste treatment plant has introduced the water into a watercourse for the purpose of maintaining or enhancing fishery, wildlife, recreational or other instream beneficial uses, the State will not grant any permits or licenses to others to use the water. Holders of existing water rights also may not use or claim such water. Cal. Water Code. §1212.

5. *How have other states considered the rights of third parties, including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins?*

See Section 3 above.

A. *Is wastewater created from the use of foreign waters and reintroduced into a natural stream considered vagrant or fugitive water and subject to third party use?*

Wastewater created from foreign waters is not subject to appropriation in the state of California. See Sections 1 and 3 above.

6. *Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged ground water or augmented surface flows that derive from the use of reclaimed water for these purposes?*

Overlying users of groundwater in California have prior and paramount rights that are unquantified, equal and correlative, and not lost to disuse. Appropriators may use surplus water not needed by overlyers but the overlyer has superior right. Anne Thomas, *Basic Groundwater Rights and Water Quality Concerns*, presented at "Recycled Water Legal Issues Seminar," WateReuse Association of California (April 26, 1996).

California has not developed any comprehensive law regarding storage rights to unadjudicated basins. However, individuals may be able to gain storage rights to unused groundwater by complying with Cal. Water Code §1005.4. Public Agencies may store imported water pursuant to Niles Sand and Gravel v. Alameda County Water District, 37 Cal.App.3d 924 (1975) with certain limits. Replenishment and recapture rights may also be established by statute. See. e.g., Water Replenishment Districts, Cal Water Code §30000 et seq. Recapture rights exist for imported or foreign water stored by public agencies with no intent for abandonment, and for any water stored pursuant to an appropriative permit from the state. See, e.g. Cal. Water Code § 1242.

An more extensive review of the groundwater recharge policies in the State of California is found in a book entitled Artificial Recharge of Groundwater. Schneider, Anne J., *Groundwater Recharge with Reclaimed Wastewater: Legal Questions in California*, Artificial Recharge of Groundwater 683-687 (Butterworth Publishers 1985). A copy of this book was not obtained for the current project.

Water quality requirements for ground water discharge have been developed by the state in a draft form. Proposals to use reclaimed water to recharge groundwater must be approved by the Department of Health Services and the Regional Water Boards. Cal. Water Code §13540.

7. *What other re-uses of water may be analytically similar to reuse of potable water effluent?*

No information was obtained concerning these issues.

8. *What issues pertaining to the use of reclaimed water are unique to the particular state*

See information above.

9. *What is the role/authority of Indian tribes, Bureau of Reclamation, Corps. of Engineers, or other Federal laws?*

The rights to reclaimed water are not affected by these parties except to the extent that the right to water is established contractually with the other governments or entities. The Federal Government is involved in some aspects of California's water reclamation systems. For example, financing of water reclamation projects may be obtained from the federal government under the Central Valley Improvement Act, Public Law 102-575.

Key Cases

Irwin v. Phillips, 5 Cal. 140 (1855)

The California Supreme Court adopted the rule of "first in time, first in right" for allocation of surface waters. This allocation doctrine remained in effect until the 1880s and is the basis for California's water right systems.

E.Clemens Horst Co. v. New Blue Point Mining Co., 177 Cal. 631, 171 P. 417 (1917)

Riparian rights do not attach to foreign waters in a stream to which riparian lands are not contiguous.

Stevens v. Oakdale Irrigation Dist., 13 Cal. 2d 343, 90 P.2d 58 (1939)

Water which has been discharged without an intention to recapture is abandoned. However, only the water released is abandoned, the water right remains. Therefore, a water user does not lose the opportunity to withhold or reuse water in the future by discharging water at the current time.

The producer of an artificial flow of foreign water is under no duty to continue maintaining that flow and may abandon the practice at any time without becoming liable to other users who were later in time. This is notwithstanding the rights lower users may acquire to abandoned foreign flows. Therefore, if a user appropriates foreign water from downstream of the discharge of such water, the user may not compel continuance of the discharge even if the downstream user has an appropriated right to the water.

Los Angeles v. Glendale, 23 Cal. 2d 68, 142 P.2d 289(1943)

Imported water that is released and subsequently recaptured is not abandoned and not subject to reappropriation. (In the case LA was releasing water for irrigation and recapturing it downstream after the water percolated into the acquifer or ran off into the river.)

Los Angeles v. City of San Fernando, 14 Cal.3d 199, 123 Cal. Rptr. 1 (1975)

Pueblo rights (those that pre-dated the acquisition of California by the United States) are superior to appropriative rights.

The City of LA was held to be entitled to use the San Fernando Basin for temporary storage of water by means of recharge and subsequent recapture.

Peabody v. Village of Vallejo, 40 P.2d 486

> The right to the use of water is limited to such water as is required for a beneficial use. Such right does not extend to the waste of water. Such right does not extend to the unreasonable use or unreasonable method of diversion of water. Riparian rights attach to, but to no more than so much of the flow as may be required for use consistent with Article X §2 of the California State Constitution.

Heyneman v. Blake, 19 Cal. 579 (1962)

> The California Supreme Court decided in this case that water, once removed from its natural channel or situation is personal rather than real property. The Court stated that "water collected in reservoirs or pipes and thus separated from the original source of supply is personal property ... an article of commerce -- as ordinary goods and merchandise."

State Water Resources Control Board, Order WR 95-6:
In the Matter of Treated Waste Water Change Petition
WW-20 of El Dorado Irrigation District,

> The use of discharged water by fish and wildlife is a beneficial use. Fish and wildlife may be considered "legal users" whose rights wastewater treatment operators must consider when deciding to reclaim wastewater and cease discharges.

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489, 45 P.2d 972 (1935).

In an action by riparian and overlying landowners to enjoin an appropriator from removing water from an area, the court must look at the use of water, the extent to which the water is being used for beneficial uses and the extent to which the water is surplus. The reasonable use doctrine was used by the court as a means of settling conflicting claims to water and modifying water right permits where necessary.

Environmental Defense Fund, Inc. v. East Bay Municipal Utility District, 26 Cal. 3d 183, 605 P.2d 1 (1986)

The constitutional requirement of beneficial use and prohibition on waste of water should be interpreted liberally to meet the changing conditions and growing needs of the people. Aesthetic and environmental well-being is an important need and should be considered when determining whether a use of water is beneficial.

Alameda County Water District v. Niles Sand and Gravel Co., Inc., 37 Cal.App.3d 924; 112 Cal. Rptr. 846 (1974)

The County pursuant to the County Water District Law, Cal. Water Code §30000 et seq., replenished the underground water source supplies by the use of percolating pits. The overlying water rights of the owners of the land overlying the pits were held to be subject to a public servitude for water and water conservation purposes. Overlying users could only appropriate such water as was required for beneficial use.

Appendix

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Ch 2.5 §275: *Proceedings to Prevent Waste or Unreasonable Use*
Ch 6: *Water Reuse*

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Ch 1 §1009: *Water Conservation Programs*
Ch 1 §1010: *Use of reclaimed ... as beneficial use, no ... loss of rights.*
Ch 1 §1210: *Exclusive Right to Treated Wastewater*
Ch 1 §1211: *Change in Point of Discharge, ... : Prior Approval*
Ch 1 §1212: *Appropriation of Treated Waste Water; Permit or License*

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Ch 3: *Urban Water Management Plans*
Ch 11: *Water Conservation and Reclamation Projects*

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Ch 7: *Water Reclamation*
Ch 7, Art. 7: *Water Reuse*
Ch 7, Art 7 §13550-13554: *Use of Potable Water Prohibited*
Ch 7.5: *Water Recycling Act of 1991*

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A Survey of Reclaimed Water Rights For the State of Arizona

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

T.C. Richmond

King County Prosecutor's Office

RECLAIMED WATER RIGHTS

A Survey of Arizona Law
by T.C. Richmond, Senior Deputy
King County Prosecuting Attorney's Office

ARIZONA

I. Introduction

In Arizona, water is public property in a running system and continues to be public property even when diverted for beneficial uses and remains such until actually applied to such uses. Although the state retains ownership of the corpus of the water, the appropriator is considered to be the lawful custodian of the diverted water.

The law regarding effluent in Arizona is dominated by the Arizona Supreme Court ruling in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989). The implications of this decision on water rights issues related to reclaimed water use is discussed in response to individual questions below. The impact of the decision on the administration of groundwater in a water-short state is reflected in the Groundwater Management Act and the 5-year management plans designed to bring Arizona to a point of safe-yield.

Under *Long*, absent legislative enactment, the state is without authority to regulate effluent. However, in its effort to ratchet down the use of groundwater, the state is able to account for the use of effluent in a calculation of gallons-per-capita- per day allocation to municipal providers using groundwater. *Arizona Mun. Water v. Department of Water Resources*, 181 Ariz. 136, 888 P.2d 1323 (Ariz.App.Div, 1994. In addition, in an effort to encourage full utilization of renewable resources, the state administers a program that gives a credit to pump groundwater in exchange for either the underground storage of effluent or the delivery of effluent to someone who would have otherwise used effluent. Through these administrative tools, the use of effluent has developed into a very vigorous program in Arizona.

II. Issues and Dimensions Worksheet

1. Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?

As explained in response to question 1.A. immediately below, Arizona does not regulate effluent as surface or groundwater, but as a distinct type of water. "Neither the statutes dealing with groundwater nor those dealing with surface water control or regulate the . . . use or disposition of effluent." *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988, 997 (1989). However, while effluent is neither groundwater nor surface water, it is certainly water and those who lawfully appropriate or withdraw water have only the right to use it in accordance with the law. *Id.* The *Long* Court addressed the use of effluent under common

law principles of water law, including beneficial use and elimination of waste. The Court invited the legislature to regulate or control the use and disposition of effluent.

A. Is the water regulated as:
(a) Surface water
(b) Ground water
(c) Developed water

No. In Arizona, waste water effluent is not considered surface water, ground water or developed. The Arizona Supreme Court, in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), held that "[u]ntil such time as it is returned to the ground as either groundwater or surface water, it is nothing more than sewage effluent. . . ." The holding was based on a construction of surface and ground water code provisions defining or utilizing the term "effluent". *Long* at 993-4. In addition, "[s]ince a return of the effluent to the stream bed would not increase the flow of the water above that before it was diverted, the effluent is not developed water." *Long* at 995-6.

B. What terms are used to define reclaimed water? For example: wastewater, recycled water etc.

The term "effluent" is used in the surface and groundwater code provisions, administered by the Arizona Department of Water Resources (ADWR) to address the use of treated waste water. "Effluent" was redefined by the legislature after the *Long* decision to mean "water that had been collected in a sanitary sewer for subsequent treatment in a facility that is regulated pursuant to §§49-361 and §§ 49-362. Such water remains effluent until it acquires the characteristics of groundwater or surface water." A.R.S. § 45-101(4). The water included in this definition is narrowed by the definition of "sanitary sewer" which is defined to mean "any pipe or other enclosed conduit that carries, among other substances, any water-carried wastes from the human body from residences, commercial buildings, industrial plants or institutions." A.R.S. § 45-101(8). This combination of these definitions limits the consideration of effluent in the water codes to waste water with a human waste component.

In Arizona, several other terms are used in the context of the storage of effluent in a state permitted underground storage facility. Since these terms have the potential to create confusion, the water they describe should be distinguished from effluent prior to such storage. A term used prior to 1994 was "recovered effluent". "Recovered effluent" is not effluent, but rather groundwater made legally available for pumping to the entity that stored effluent in another part of the groundwater basin. This confusing use of the term "effluent" led to the decision in, *Arizona Mun. Water v. Department of Water Resources*, 181 Ariz. 136, 888 P.2d 1323 (Ariz.App.Div, 1994), in which the court distinguished between "effluent" and "recovered effluent".

The term "stored water" used in the Underground Water Storage, Savings and Replenishment Act, enacted in 1994, is defined as " water that has been stored or saved underground pursuant to a storage permit issued under this chapter." A.R.S. § 45-802.01(18). Effluent is one of the types of water that is available for storage under these permits. "In lieu water" means "water that is delivered by a storer to a groundwater savings facility pursuant to permits issued under this chapter and that is used in an active management area or an irrigation non-expansion area by the recipient on a gallon-for - gallon substitute basis for groundwater that otherwise would have been pumped from within that active management area or irrigation non-expansion area." Effluent may qualify as in lieu water that substitutes for the use of groundwater under a permit giving an entity that delivers effluent a credit to pump groundwater.

The Regulations for the Reuse of Wastewater, adopted by the Arizona Department of Environmental Quality (ADEQ), define "reclaimed water" as "effluent which meets the standards for the specific reuses contained in R18-9-703." R18-9-701(11). ADEQ defines "effluent" as "wastewater that has completed it passage through a wastewater treatment plant." R18-9-701(2). Finally, "wastewater" means "sanitary wastes of human origin, sewage, gray water, and industrial waste that contains sanitary wastes or are used in the production or processing of any crop or substance which may be used as human or animal food." R18-9-701(16). Thus, ADEQ regulates from a water quality standpoint the reuse of a broader class of water than is considered in the Water Code administered by ADWR.

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?

As explained above, the *Long* decision took effluent out of the regulatory control of ADWR. The Arizona legislature has thus far not accepted the Court's invitation to regulate and control the use and disposition of effluent. The right to use the effluent has been addressed in contract and Indian water right settlements. The basis for these agreements is that the producer of effluent has the right to put effluent to beneficial use and to enter into contracts for its use.

The *Long* Court, citing *Lambeye v. Garcia*, 18 Ariz. 178, 157 Pac. 977 (1916) and *Wedgeworth v. Wedgeworth*, 20 Ariz. 518, 181 Pac. 952 (1919), stated that waste or surplus waters were subject to appropriation only when and if flowing in a natural channel. *Long* at 996-7. However, in answering the question of how rights to effluent (prior to discharge into the natural stream channel) are acquired, the *Long* Court suggests that it is acquired through the production of the effluent by the treatment process. The Court calls the cities the senior appropriators of the effluent based on the fact that they produced it. *Long* at 997.

In Arizona, an indirect appropriate-type relationship exists for effluent in the Underground Water Storage, Savings and Replenishment Act, A.R.S. 45-801.01 et seq.,

enacted in 1994. This Act controls the underground storage of effluent if groundwater pumping credits are sought for the storage. If effluent is stored pursuant to state permit, groundwater pumping credits are accrued.

D. Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses? For example: surface spreading, wetlands creation, golf courses or industrial uses.

No. See explanation in II.C. above,

2. How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?

This question is not addressed by statute in Arizona. In *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989, the Arizona Supreme Court held that the producer of effluent had the right to beneficially use or to contract for the beneficial use of its effluent. This decision was based on common law principles governing the use of all waters. The *Long* Court states that the right to use effluent is acquired through the production of the effluent by the treatment process. The Court calls the cities the senior appropriators of the effluent based on the fact that they produced it. *Long* at 997. This suggests that there is no right in Arizona to the use of the effluent derived for the water right holder's first use of the water.

A. Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so how?

Whether the use of wastewater or reclaimed water within the scope of an original water right is not addressed by statute. However, the early case law in the agricultural irrigation context, recognized a right in persons who recover drainage water applied through irrigation to dispose of such waters by sale or otherwise. *Brewster v. Salt River Valley Water User's Ass'n*, 229 P. 929 (Ariz. 1924). As described in the introduction to the response to question 2, the *Long* decision suggests the right to use effluent lies with the producer of the effluent. This producer of effluent may or may not be the original water right holder.

B. What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?

This issue is not addressed by statute in Arizona. The *Long* decision prevents ADWR from having a regulatory role in the use of effluent, absent legislative enactment.

In the *Long* decision, the Arizona Supreme Court upheld the right of the cities who produced effluent to contract for the use of the effluent as cooling waters at the Palo Verde nuclear power plant, an industrial use. This plant is located a great distance from

the area of original water use and the Court directly and affirmatively answered the question of whether the cities can contract to sell sewage effluent for use on lands other than those involved in the original appropriation. Although a portion of the water discharged to the sewage system may have been for industrial, a significant portion would have been for municipal use and was, therefore, beyond the scope of the original water right.

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use? For example: if the original permit is for municipal use of water, can the permittee recycle the water and use it for surface spreading or industrial uses without first obtaining a permit? If so how?

This issue is not addressed by statute in Arizona. The *Long* decision prevents ADWR from having a regulatory role in the use of effluent, absent legislative enactment. The Court recognized a right of use in those entities that produce the effluent or by others under contract or Indian water right settlement, is not directly regulated.

(ii) Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? i.e. Do states restrict reclaimed water to particular manners of use?

This issue is not addressed by statute in Arizona. The *Long* decision prevents ADWR from having a regulatory role in the use of effluent, absent legislative enactment. The Court recognized a right of use in those entities that produce the effluent or by others under contract or Indian water right settlement, is not directly regulated.

(iii) Do states restrict the use of reclaimed water to a particular place. For example, Is the use of reclaimed water restricted to the same place of use as the water that generated the wastewater?

This issue is not addressed by statute in Arizona. The *Long* decision prevents ADWR from having a regulatory role in the use of effluent, absent legislative enactment. The Court recognized a right of use in those entities that produce the effluent or by others under contract or Indian water right settlement, is not directly regulated.

3. Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source.

The Arizona Supreme Court directly addressed this issue in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989). In *Long,* several cities in the Phoenix metropolitan area contracted to sell effluent to electrical utilities for cooling water for the Palo Verde nuclear power plant located a significant distance from Phoenix. Several developers and ranches downstream of the Phoenix effluent discharge point brought suit seeking to invalidate the contracts. The argument raised by the ranchers was that the cities had no right to sell unconsumed effluent because the unused surface waters must be returned to the river bed. The cities argued that effluent is water that has lost its character as either ground or surface water and becomes the property of the entity which has expended funds to create it. Therefore, they are the owners of the effluent and may dispose of their property in any way they see fit. *Long* at 993.

The *Long* Court held that although the cities do not own the water (because no one owns water in Arizona), they can put it to any reasonable use they sees fit. Based on early cases dealing with waste water in the agricultural irrigation setting, *Lambeye v Garcia*, 18 Ariz. 178, 157 Pac. 977 (1916) and *Wedgeworth v. Wedgeworth*, 20 Ariz. 518, 181 Pac. 952 (1919), the Court held that the cities may discontinue the discharge of effluent without violating the rights of those persons or entities which have previously appropriated it. "Because the 'producer' of the effluent is a senior appropriator, those who have appropriated the effluent gain no right to compel continued discharge." *Long* at 997.

A. Can wastewater and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?

In Arizona, effluent becomes available for appropriation by downstream users only when it is discharged into the stream bed and is water flowing in a stream. Long at 997.

(i) Is the source of water important?

No, under the *Long* decision, the source of the waste water is irrelevant.

(ii) Is the use of imported water by the importer restricted by third party claims?

This issue is not specifically addressed in Arizona. Under *Brewster v. Salt River Valley Water Users' Ass'n,* 229 P. 929 (Ariz. 1924), persons who recover drainage water put into the ground by artificial irrigation to have a right to dispose of such water by sale or otherwise as against a downstream appropriator. Such waters are not naturally in the ground and, therefore, are not subject to appropriation under state law.

(iii) Does equity play a role in determining who is entitled to the use of wastewater? For example: does the party that incurs the labor and expense have a superior right to the water against third party claims?

The *Long* Court stated that "[b]ecause the 'producer' of the effluent is a senior appropriator, those who have appropriated the effluent gain no right to compel continued discharge." *Long* at 997. The Court's holding that the producers of the effluent have a senior right to downstream users such that those cities are not compelled to continue discharge indicates that equity may have played a role in its decision. This conclusion is strengthened by the Court's consideration of the necessity of the cities to economically deal with noxious waste water.

4. Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?

The Arizona Supreme Court in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989) considered the resulting unavailability of water to the downstream users as a result of discontinues discharge of effluent. It found that the downstream users had no right to the maintenance of the stream flow to support their appropriation.

A. Does the introduction of wastewater and/or reclaimed water, into a natural stream system, which then increases the volume of the natural stream, then become a part of the natural stream by entry therein?

Once effluent is discharged into the stream, it becomes part of the stream flow subject to appropriation.

B. Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?

The discharge of effluent by the waste water treatment facility is not in an or itself a beneficial use. It is the act through which the treater relinquishes control over the waste water and it becomes surface water.

However, in Arizona a water right certificate may be obtained from ADWR for instream uses. (Several instream water right permits have been issued to the Nature Conservancy in southern Arizona.) The discharge of effluent in a stream for the purposes of habitat maintenance or restoration would be a beneficial use.

(i) Is a permit necessary for instream uses of waste water and/or recycled water?

Yes, a surface water permit would be required to protect the use of effluent for instream uses. Otherwise, the discharged effluent would become available to appropriation.

5. How have other states considered the rights of third parties, including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins?

In Arizona, this issue has not been directly addressed by either statute or caselaw. However, the decision in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989) indicates that the source of the water is irrelevant; the third parties do not have a right to continued benefit of wastewater discharge. This ruling would likely apply to waste water generated from imported water.

A. Is wastewater, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?

This is not specifically addressed in Arizona. However, the decision *Long* indicates that the source of the water is irrelevant; the third parties do not have a right to continued benefit of wastewater discharge. This ruling would likely apply to waste water generated from imported water.

6. Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?

Under *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), the producers of the effluent have a right to reasonable and beneficial use of the effluent until they discharge it to the natural stream. There is not system for accruing credits for surface water appropriation based on the effluent discharged to the stream. Such a system does exist for groundwater. Under A.R.S. § 45-801.01 et seq, the Underground Water Storage, Savings and Replenishment Act, entities with the legal right to use the effluent can store effluent underground and accrue credits for the pumping of groundwater from within the same basin.

A. Is there a different analysis if the generator is a entity other than the holder of the original water right?

No. The original water right is irrelevant.

7. What other re-uses of water may be analytically similar to reuse of potable water effluent?

The fact that the Arizona Supreme Court in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), relied on the early agricultural irrigation cases for the analysis of when wastewater become appropriable, indicates that the reuse of irrigation water is analytically similar.

8. What issues pertaining to the use of reclaimed water' are unique to the particular state.

Based on the decision of the Arizona Supreme Court in *Arizona Public Service Company v. John F. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), contracts have been negotiated for the use of effluent, Indian water rights claims have been settled and complex programs for the storage and recovery of effluent have been authorized by statute. It is very unlikely that if the legislature followed the Supreme Court's suggestion and enacted an effluent management code that the legislature would disturb the disturb the control of the effluent with the producer of the effluent.

In Arizona, because effluent is not considered groundwater or surface water, it is not the same water provided by water purveyors. Therefore, if effluent is provided to a customer within the service area of a water purveyor, the provider of effluent is not considered to be illegally competing in the service area of the purveyor. *Arizona Water Co. v. City of Bisbee,* 172 Ariz. 176, (Ariz.App.Div.2, 1991).

9. What is the role/authority of Indian Tribes, Bureau of Reclamation, Corp. of Engineers, or other Federal laws?

Effluent produced by a city near an Indian reservation has been a source of water for Indian water right settlements approved by courts in the ongoing Arizona general stream adjudications. The use of effluent produced on reservation and used on reservation would be controlled or regulated by the Tribes. The use of effluent on a federal reclamation project would likely not affect the ability to obtain project water.

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A Survey of Reclaimed Water Rights For the State of Colorado

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

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RECLAIMED WATER RIGHTS IN COLORADO

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SUMMARY

Colorado water allocations are based on the Doctrine of Prior Appropriation or the First-in-Time, First-in-Right Doctrine. These appropriative rights are administered by Division of Water Resources officials who follow state law and established procedures in administering and allocating water to users according to decreed priorities.

Colorado's doctrine of prior appropriation is applicable to Colorado's streams and water tributary to those streams, but not to nontributary water. The State constitution declares that the unappropriated water of every natural stream is the property of the public, subject to appropriation, and that the right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied.[1] The constitution also provides that as between those using water for the same purpose, priority of appropriation shall give the better right.[2] These constitutional expressions of the appropriation doctrine have been supplemented by legislative declaration that all waters of the State have always been and are the property of the public, dedicated to the use of the people, subject to appropriation and use in accordance with the law.[3]

"Waters of the State" include all surface and underground water tributary to all natural streams within Colorado. Seepage, wastewater, flood water, return flow, springs, mine water and groundwater are all presumed to be tributary to a natural stream, and those waters are all subject to the constitutional doctrine of appropriation.[4] Nontributary groundwater and groundwater in the Denver Basin is separately administered.[5]

Colorado is the only prior appropriation state without a permit system. Water right matters are adjudicated in special state district courts called water courts.[6] Colorado is divided into seven Water Divisions, one for each of the seven major drainage systems in the state.

Colorado has not adopted a specific statutory scheme addressing waste water effluent. In short, Colorado water law allows only one use of "native" water taken from the stream. Only "developed" water can be subjected to reuse or successive uses.[7]

COLORADO ISSUES AND DIMENSIONS

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1 Colo. Const. art XVI, sec. 5 and 6.

2 Colo. Const., art. XVI, sec.6.

3 Colo. Rev. Stat. Ann., §37-92-102

4 See Water & Water Rights, Vol. 6, 255-6 (1991)

5 Id at 256

6 Colo. Rev. Stat. Ann §37-92-203.

7 City and County of Denver v. Fulton Irrigation Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972).

1. *Does Colorado regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the State?* The State of Colorado has the authority to regulate and administer the beneficial use of wastewater.

   A. *Is the water regulated as: a) surface water; b) ground water; c) developed water?* Water discharged into a stream after being used to process sewage is waste water,[8] and is therefore regulated as waters of the state.

   B. *What terms are used to define reclaimed water?* Colorado's statute does not specifically address "reclaimed water". Colorado courts have categorized waters as seepage and spring waters, salvaged and developed waters, waste water, return flow, and foreign water. As state above, water which is left over after being used to process sewage is wastewater and therefore falls within the definition of waters of the state. Wastewater has been judicially defined as water which is not absorbed into the earth after irrigation application and is collected in a waste ditch.[9] This definition of waste water is not entirely clear, the basic concept seems to be that it is water which is "left over" after application to beneficial use and which remains on the land or within the control of the appropriator.[10]

   In City of Boulder v. Boulder & Left Hand Ditch Co. 192 Colo. 219, 557 P.2d 1182 (1976), the court established that waste water is to be distinguished from return flow or seepage stating "return flow is not waste water. Rather, it is irrigation water seeping back to a stream after it has gone underground to perform its nutritional function."

   "Developed water" is water that an appropriator makes available for use which would otherwise not be available to a stream by any natural means.[11]

   Foreign water is similar to developed water in that it is brought into a watershed solely through the efforts of the appropriator. There are two different ways in which water can be classified as foreign. It can be brought from a totally unconnected drainage basin (transmountain diversions), or it can be brought from one watershed into another, but within the same stream system.

   C. *How are rights to reclaimed water acquired?* Wastewater can be appropriated just as any other water of the state.

   D. *Is the permit for the use of wastewater, effluent and/or reclaimed water limited to specific uses? For example, surface spreading, wetlands creation, golf courses or industrial uses?* Colorado does not have a permit system but rather adjudicates water rights. A water right can be changed to a new use, point of diversion, place of use or manner of use without loss or priority, provided no other water rights are injured by the change. [12] Such changes must be authorized by a decree from the water court.

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[8] Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co., 179 Colo. 36, 499 P.2d 1190 (1972)

[9] City of Boulder v. Boulder & Left Hand Ditch Co., 192 Colo. 219, 557 P.2d 1182 (1976).

[10] See George Vranesh, Colorado Water Law, Vol. 1, 335-6.

[11] Coryell v. Robinson, 118 Colo. 225, 194 P.2d 342 (1948).

[12] Colo. Rev. Stat. Ann. §37-92-305(3) and 37-92-103(5). See also Weibert v. Rothe Bros. Inc., 618 P.2d 1367 (Colo. 1980).

2. *How does Colorado interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?* Water rights in Colorado can be viewed as private property whereby an individual owns the rights to beneficial use of the water. It is usually characterized as an interest in real property - a usufruct.[13] As such, it is a vested property right, protected by the Constitution,[14] until lost by abandonment.[15] It is alienable and transferable, either as an appurtenance to land, or if severed from the land, separately and independently therefrom.[16]

A water right, in addition to being sold, may also be loaned or changed on a temporary basis for irrigation purposes. Such exchanges are allowed by statute among appropriators on the same stream in order to save crops or make more economical use of water.[17] Those who make such arrangement must give notice and be prepared to show that no injury will occur to junior appropriators.

Colorado law also authorizes the practice of substitution or exchange of water in which individuals or private or public entities may provide substituted supplies of water to appropriators senior to them to satisfy the rights of the senior. In return, the suppliers may then take and use amounts of water equivalent to the amounts supplied to the senior appropriator. A practice of substitution or exchange may constitute an appropriative right and may be adjudicated as any other right.[18]

A. *Does Colorado law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?* Wastewater is defined as waters of the state and as such is subject to only one use after which it must be returned to the stream.

B. *What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc) of the original water right?* Any change of a water right must be authorized by the water court.

3. *Under what circumstances, if any, has Colorado considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?* Colorado has extensively considered the rights of third parties. Only developed water can be subjected to reuse or successive uses. Native waters must be returned to the stream to be appropriated by junior appropriators. However, in the matter of imported water, the courts have not yet addressed the situation in which for many years, an importer of water has, after its use, discharged the water not consumed by its use into the natural streams of the state where it has been appropriated by others, and subsequently, the importer thereafter recaptures it from the stream.

A. *Can wastewater and/or recycled water be considered within common law waste, seepage and*

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[13] West End Irr. Co. v. Garvey, 117 Colo. 109, 184 P.2d 476 (1947); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

[14] Town of Sterling v. Pawnee Ditch Ext. Co., 42 Colo. 421, 94 Pac. 339 (1908).

[15] Colo. Rev. Stat. Ann. §37-92-103.

[16] James v. Barker, 99 Colo 551, 64 P.2d 598 (1937).

[17] Colo. Rev. Stat. §37-83-101 to 105.

[18] Colo. Rev. Stat. Ann., §37-80-120.

return flow doctrine wherein third parties can make appropriations of these waters? In City of Boulder v. Boulder & Left Hand Ditch Co. 192 Colo. 219, 557 P.2d 1182 (1976), the court established that waste water is to be distinguished from return flow or seepage; only the return flow and seepage are included as part of the stream conditions to which juniors cam make claim. Waste water cannot be appropriated in such a way as to give the appropriator a right to have the irrigator continue to discharge waste into the stream.[19]

Colorado courts have held that one who captures waste water from the lands of another acquired no vested right in that water.[20] In most cases there is no vested right in downstream appropriators to insist on the maintenance of the point of return of waste water to the stream. The policy behind the general rule of "no vested rights" in waste water presumes it would be inefficient and wasteful to require the continuation of waste water as a means of supplying another appropriator.[21]

(i) *Is the source of the water important?* Yes. Colorado has judicially and statutorily adopted a developed water doctrine to deal with claims to nontributary surface water. Colorado has long recognized the premise that developed water belongs to the developer independent of the rights of other water right holders.[22] Foreign water is similar to developed water in that it is brought into a watershed solely through the efforts of the appropriator. There are two different ways in which water can be classified as foreign. It can be brought from a totally unconnected drainage basin (transmountain diversions), or it can be brought from one watershed into another, but within the same stream system. Just as waste water is not seepage or return flow, and is not water which an appropriator can put to beneficial use in order to gain a priority, foreign or imported water is water in which junior appropriators cannot establish vested rights.[23]

(ii) *Is the use of imported water by the importer restricted by third party claims?* No.

(iii) *Does equity play a role in determining who is entitled to the use of wastewater? For example, does the party that incurs the labor and expense have a superior right to the water against third party claims?* The courts have held that, where a person by his own efforts has increased the flow of water in a natural stream, he is entitled to the use of the water to the extent of the increase.[24]

4. *Under what circumstances, if any, has Colorado considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?* I have been unable to find any cases which address this issue.

A. *Does the introduction of wastewater and/or reclaimed water into a natural stream system, which*

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[19] See George Vranesh, Colorado Water Law, Vol. 2, 656-7, (1987)

[20] Burkart v. Meiberg, 37 Colo. 187, 86 P. 98 (1906); Green Valley Ditch Company v. Schneider, 50 Colo. 606, 115 P.705 (1911).

[21] See George Vranesh, Colorado Water Law, Vol. 1, 341.

[22] Platte Valley Irrigation Co. v. Buckers Irrigation, Milling & Impr. Co., 25 Colo. 77, 53 P.334 (1898).

[23] See George Vranesh, Colorado Water Law, Vol II, 660

[24] Leadville Mine Development Co., v. Anderson, 91 Colo. 536, 17 P.2d 303 (1932).

then increases the volume of the natural stream, then become a part of the natural stream by entry therein? In Colorado, where one has clear title to water, the general rule is that a natural channel may be used to convey it from one point to another; denial of the right to recapture waters after they have left one's land is based upon the point that the appropriator's interest in such waters has ceased and he no longer has any title to them.[25] Once the appropriator has lost dominion and control, the waters revert to the state and are available for appropriation by third parties.

B. *Does the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?* In Colorado, instream uses require a water right.

(i) *Is a permit necessary for instream uses of wastewater and/or recycled water?* N/A

5. *Has Colorado considered the rights of third parties including other water users, when these third parties are benefitted by wastewater discharges created from the use of water which has been imported from other basins?* This issue has been addressed in the preceding discussion.

6. *Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?* Unclear.

7. *What other re-uses of water may be analytically similar to reuse of potable water effluent?* I was unable to find any Colorado law addressing this issue.

8. *What issues pertaining to the use of reclaimed water are unique to Colorado?* Unclear

9. *What is the role/authority of Indian Tribes, Bureau of Reclamation, Corps of Engineers, or other Federal Laws?* Unclear.

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25 Fort Morgan Res. & Irr. Co. v. McCune, 71 Colo. 256, 206 P. 393 (1922).

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Convened by the Washington State Department of Ecology

June to August, 1996

By:

Robert Caldwell

Attorney General's Office

WATER RIGHTS FOR RECLAIMED WATER IN TEXAS

Prepared by Robert N. Caldwell

INTRODUCTION

Texas water rights law is a hybrid system.[1] "The historical roots of hybrid systems vary among jurisdictions. The common denominator is that each state recognized riparian rights at first, but eventually adopted the appropriation system because it was believed to be more suitable for allocating rights to use water."[2] Texas adopted the appropriation doctrine in 1889.[3]

In all hybrid states there is an inconsistency between the riparian system and appropriation doctrine,[4] and Texas is no exception to that rule. Groundwater that percolates through the soil in Texas, and is not supplied by subterranean or other streams of any kind, is governed under the riparian doctrine and particularly the English case of Acton v. Blundell, 12 M.&W. 324,354 (1843).[5] Surface water, however, is the property of the state.[6] Accordingly, although land owners are entitled to the

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[1] See David H. Getches, WATER LAW IN A NUTSHELL, 7 (1990).

[2] Id at 192.

[3] See Water Appropriation Act of 1889 (Acts 1889, 21st Leg., p.100, ch. 88), The Texas statute that adopted the appropriation doctrine was a copy of those statutes that were previously adopted by Wyoming and Nebraska.

[4] See David H. Getches, WATER LAW IN A NUTSHELL, 192 (1992).

[5] See W. Hutchins, TEXAS LAW OF WATER RIGHTS, 460,461 (1961). citing Houston & T.C.R.R. v. East, 98 Tex. 146, 148, 81 S.W. 279, 107 Am.St.Rep.620, 66 LRA 738 (1904). "The owner of land may take the percolating water therefrom for his own purposes at his pleasure, and that if he thereby intercepts or drains off the percolating water in his neighbors land no action will lie for damages."

[6] See Tex. WATER CODE ANN. § 11.021 (Vernon 1995).

(a) The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.

(b) Water imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state is the property of the state.

unrestricted use of groundwater, they are not entitled to divert surface water from its natural channel without first acquiring a water right under the Texas Water Code.[7]

The Texas Natural Resource Conservation Commission (TNRCC) is the agency of the state given the statutory responsibility for implementing the constitution and laws of Texas relating to natural resources,[8] and has particular jurisdiction over "water and water rights including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights."[9]

In administering the state water code, Texas requires that all persons who propose to divert state water apply for a permit.[10] The application must, among other items, identify the source of water supply, the nature and purpose of the proposed use and the amount of water to be used for each purpose, and state the location and description of the proposed facilities.[11] TNRCC can incorporate into water rights permits any condition, restriction, limitation or provision reasonably necessary for the administration and enforcement of the state water laws.[12]

RESPONSE TO ISSUES AND DIMENSIONS

1. Does Texas regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source

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[7] TEX. WATER CODE ANN. § 11.022. (Vernon 1995). Acquisition of Right to Use State Water.

The right to use state water may be acquired by appropriation in the manner and for the purposes provided in this chapter (Chapter 11. Water Rights). When the right to use state water is lawfully acquired, it may be taken or diverted from its natural channel.

[8] See TEX. WATER CODE ANN. § 5.012 (Vernon 1995). Declaration of Policy

[9] See TEX. WATER CODE ANN. § 5.013 (Vernon 1995). (Concerning the general jurisdiction of the Texas Natural Resource Commission).

[10] See TEX. ADMIN. CODE tit. 30, § 297.21 (1986). (A permit under the Texas Water Code § 11.121, for direct diversion is required of all persons who propose to divert state water from a watercourse or its underflow, unless the water is to be used for domestic and livestock uses. The manner of diversion may be by pumping or by gravity flow.

[11] TEX. WATER CODE ANN. § 11.124.

[12] TEX. ADMIN. CODE tit. 30, § 297.42 (1986).

of water subject to the water rights laws of the state?

Yes. Although Texas does not have a specific set of statutes concerning reuse of wastewater per se, Texas does regulate recycled wastewater through existing statutes, case law and administrative regulations.

In Texas all water appropriation laws were passed subsequent to a 1917 constitutional amendment,[13] that reads, in part, as follows:

> The conservation and development of all the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and other useful purposes, the reclamation and irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its over-flowed lands, and lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.[14]

STATUTES

The Texas legislature passed all water appropriation laws subsequent to the adoption of the constitutional amendment of 1917, and they must be construed in the light of it and of its objectives, both expressed and implied.[15] The following statutory provisions and case law are regarded as controlling of the question of ownership of recycled water, and are the basis of Texas' regulation of recycled water.

Section 11.021 of the Texas Water Code declares that surface water is the property of the state."[16] The right to the use of state water may be acquired by appropriation in the manner and for the purpose provided in § 11.022, and when the right to use state

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[13] Clark et al. v. Briscoe Irr. Co., 200 S.W.2d 674, 680 (Tex.Ct.App. 1947).

[14] Tex. Const. art. XVI, sec. 59a

[15] 200 S.W.2d at 680.

[16] TEX. WATER CODE ANN. § 11.021 (Vernon 1995).

water is lawfully acquired, it may be taken or diverted from its natural channel.[17]

In Texas waters of public streams belong to the state in trust for the public.[18] Appropriators of water do not own the corpus of water but have a usufructuary right to its use. That right depends upon possession, and after the water has once left the possession of the appropriator, it is lost beyond recall.[19]

Section 11.023 prescribes the purposes for which water may be appropriated. The amount of water appropriated for each purpose is limited to that particular purpose. In other words, water may only be appropriated for a particular purpose and the use of water is limited to that particular purpose.

The Texas legislature established the Texas Natural Resources Conservation Commission (TNRCC) as the agency with primary responsibility for implementing the constitution and laws relating to the conservation of natural resources and the protection of the environment.[20] This commission has jurisdiction over water and water rights including the issuance of water rights permits, water rights adjudication, cancellation and enforcement of water rights.[21] There is implicit in the provisions of the Texas Water Code, constitutional and statutory, a vesting in the TNRCC the continuing duty of supervision over the distribution and use of the public waters of the State so as to see that the constitutional and statutory objectives are attained.[22]

Section 11.121 provides that water may not be diverted from its natural channel without first obtaining a permit from the TNRCC to make an appropriation.[23] The legislature also declared that all rights to use state water under a permit or a certified filing are limited to the amount specifically appropriated subject to the amount which can be beneficially used for the purpose specified in

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[17] TEX. WATER CODE ANN. §11.022 (Vernon 1995).

[18] South Texas Water Co. v. Bieri, 247 S.W.2d 268, 272 (Tex.Ct.App. 1952).

[19] South Texas Water Co., 247 S.W. 2d at 272-273

[20] See TEX. WATER CODE ANN. § 5.012 (Vernon 1995).

[21] TEX. WATER CODE ANN. § 5.013

[22] Clark, 200 S.W.2d at 682.

[23] TEX. WATER CODE ANN. § 11.121

the permit.[24] In other words the amount of water that is available under a particular appropriation is limited to the amount of water that can be beneficially used for the purpose allowed under the permit.

TNRCC also regulates amendments to water rights under section 11.323. Water users must obtain authority from TNRCC to change the place of use, purpose of use, point of diversion, rate of diversion, acreage to be irrigated, or otherwise alter a water right.[25] It follows then that if a permit were issued to a water purveyor for municipal uses, that no use could be made of that water for any other purpose unless an amendment to the permit is first obtained from TNRCC.

In summary, under the Texas Constitution the State owns all surface waters. The State Legislature has authority, under the State Constitution, to pass laws prescribing their use. The Legislature has adopted laws regulating the appropriation, use and amendment of water rights. The Texas Natural Resource Conservation Commission has authority from the Texas Legislature to administer water rights. The regulation and administration of wastewater effluent and/or recycled water is governed by these provisions.

CASE LAW

Like statutory law, there is no case law in Texas that deals with reuse of sewage effluent per se, however, there are cases that are analogous to the reuse of effluent. For example: in Harrell v. Vahlsing, 248 S.W. 2d 762, 768 (Tex. Ct. App. 1952), the court held that "the [water user] is possessed of a usufructuary right in and to the [water source] under the doctrine of developed waters." That doctrine decrees that:

> One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface runoff and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual

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[24] TEX. WATER CODE ANN. § 11.025

[25] TEX.WATER CODE ANN. § 11.122

> possession of such water. So long as he does not abandon it or forfeit it by failure to use he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.'[26]

By applying the developed waters doctrine to recycled water issues, it follows that a wastewater treatment operator that has a water right permit from TNRCC for the treatment of effluent could make any subsequent use that is consistent with the terms of its original permit.

HYPOTHETICAL CASE

By applying statutory and case law previously discussed to a hypothetical municipal water purveyor wanting to recycle sewage effluent, we can demonstrate how Texas regulates recycled water.

If a water purveyor was issued a municipal water right permit[27] by TNRCC[28] and was beneficially using water within the parameters of that water right permit[29], the municipal water purveyor could retain control of the water and reuse it[30] for the purposes allowed in the permit issued by the TNRCC[31]. However, if there is a change in the place or purpose of use of the water right permit, such as to recycle wastewater for some industrial purpose

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[26] Ide v. United States, 263 U.S. 497, 44 S.Ct.182 (1924), quoted in Harrell v. Vahlsing, 248 S.W.2d at 762.

[27] §§§ 11.021, 11.022, 11.121 (Pertaining to state ownership of water, acquisition of right to use state water and requirement to obtain a permit).

[28] § 3.013 (Pertaining to the general jurisdiction of TNRCC to issue permits and regulate natural resources).

[29] § 11.025 (Pertaining to the scope of the appropriative right).

[30] See Harrell v. Vahlsing, 248 S.W.2d 762 (1952).

[31] § 11.023(e) (Pertaining to purposes for which water may be appropriated).

outside the place of use of the original permit, the provisions of § 11.122 would apply and the hypothetical municipal water purveyor must apply to TNRCC[32] for authority to alter the water right. If however, the municipal water purveyor were to treat the sewage effluent so that it could be recycled for a beneficial purpose consistent with its original permit, such as substituting recycled water for potable water, no change in the water permit would be required[33].

Additionally, if for example, an industrial user were to make an agreement with the water purveyor for the use of reclaimed water, the industrial user would be required to obtain a permit from TNRCC for before it could use the wastewater, and the water purveyor would also be required to alter its water right permit to allow for the change in use.[34] This requirement is necessitated because the state, as ultimate owner of all surface water, regulates water use by statutes. This would not mean that the recycling could not occur, it is a matter that the state is the ultimate owner of the water and municipal water purveyors or industrial users, or any other water user, have only a usufructuary right to its use[35].

2. How does Texas interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?

Texas grants a water right holder a usufructuary right. The extent of that right is defined by the Texas Supreme:

> [T]he right which one obtains by a water permit for appropriated waters is a right which is limited to beneficial and non-wasteful uses. This is made clear by the statute which defines the right which is granted:
>
> > Art. 7542. Water Right Defined. A water right is the right to use the water of the State when such use has been acquired by the application for water under the statutes of this

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[32] § 11.122(b) (Pertaining to the authority of the TNRCC to adopt rules to effect the provisions requiring permit to alter a water right).

[33] See Harrell v. Vahlsing

[34] §§ 11.021-11.023, 11.025, 11.121, 11.122.

[35] South Texas Water Co. v. Bieri, 247 S.W.2d at 272.

> chapter. Such use shall be the basis, the measure and the limit to the right to use water of the State at all times, not to exceed in any case the limit of volume to which the user is entitled and the volume which is necessarily required and can be beneficially used for irrigation or other authorized uses.
>
> By definition, the permittee receives only the right to use the water for beneficial purposes.[36]

It would follow then that a municipal water purveyor, by obtaining a water right from the TNRCC, would not obtain ownership of the water. They would receive a usufructuary right limited by the water right permit granted by TNRCC to use the water for beneficial purposes; that use would then be the basis, measure and limit of the right.

Texas courts hold that "an appropriator of water from a public stream does not acquire the ownership or corpus of the water but merely acquires the right to the use thereof for the purposes set forth in the permit under which he appropriates."[37] A municipal water company could make any use of water that is consistent within the terms of the permit issued by the Commission. If municipal water purveyors want to make uses other than those allowed TNRCC, they must comply with § 11.122 and amend their water right permit.

The developed waters doctrine in Texas allows recycling of water by municipal water purveyors if those uses are in conformance with the terms of a water right permit. "One who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses..."[38]

3. Under what circumstances has Texas considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?

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[36] Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642 (Tex. 1971).

[37] South Texas Water Co., 247 S.W.2d 268, 272 (Tex. Ct.App. 1952).

[38] See Harrell v. Vahlsing, Inc., 248 S.W.2d 762, (Tex. Ct. App. 1952).

As discussed above all surface waters belong to the state;[39] any use of water is regulated by statutes [40]and administered by TNRCC.[41] Third party users of wastewater could obtain a water right to use recycled water only after applying for and receiving a water right permit from TNRCC.

4. Under what circumstances has Texas considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?

There are no specific provisions in Texas law that deal with instream flow levels. The TNRCC does require that water users, who transport water through natural water channels, suffer the normal stream losses that occur through transport.[42]

5. How has Texas considered the rights of third parties, including other water users, when these third parties are benefitted by wastewater discharges created from the use of water which has been imported from other basins?

There are no specific provisions in Texas law that deal with this issue.

6. Under what circumstances in Texas do generators of reclaimed water have rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?

Texas does not regulate ground water. Any right to appropriate augmented surface flows in Texas must be acquired from TNRCC.[43]

TEXAS STATUTES

1. § 5.012. Declaration of Policy

2. § 3.013. General Jurisdiction of Commission

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[39] § 11.021.

[40] § 11.121.

[41] § 5.012.

[42] Phone conversation with Mark Jordan, attorney for TNRCC 7/18/96.

[43] § 11.121.

3. § 11.001. Vested Rights Not Affected

4. § 11.002. Definitions

5. § 11.021. State Water

6. § 11.022. Acquisition of Right to Use State Water

7. § 11.023. Purposes for Which water May be Appropriated

8. § 11.024. Appropriation: Preferences

9. § 11.025. Scope of Appropriative Right

10. § 11.026. Perfection of an Appropriation

11. § 11.028. Exception

12. § 11.029. Title to Appropriation by Limitation

13. § 11.030. Forfeiture of Appropriation

14. § 11.033. Eminent Domain

15. § 11.040. Permanent Water Right

16. § 11.046. Return Unused Water

17. § 11.121. Permit Required

18. § 11.122. Amendments to Water Rights Required

19. § 11.123. Permit Preferences

20. § 11.124. Application for Permit

21. § 11.134. Action on Application

TEXAS CASES

1. Ide v. United States, 263 U.S.497, 44 S.Ct.182 (1924).

2. Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Ct. App. 1947).

3. Heard v. State, 146 Tex. 139, 204 S.W.2d 344 (1947).

4. South Texas Water Co. v. Bieri, 247 S.W.2d 268 (Tex. Ct. App. 1952).

5. Harrell v. Vahlsing, 248 S.W.2d 762 (Tex. Ct. App. 1952).

6. Scoggins v. Cameron County Water Imp. Dist. No. 15, 264 S.W.2d 169 (Tex. Ct. App. 1954).

7. Guelker v. Hidalgo County Water Improvement Dist. No. 6, 269 S.W.2d 551 (Tex. Ct. App. 1954).

8. Halsell v. Texas Water Commission , 380 S.W.2d 1 (Tex. Ct. App. 1964).

9. Texas Water Right Commission v. Wright, 464 S.W.2d 642 (Tex 1971).

10. Lower Colorado River Authority v. Texas Department of Water Resources, 689 S.W.2d 873 (Tex. 1984).

TEXAS JOURNAL ARTICLES

1. Frank R. Booth, Ownership of Developed Water: A Property Right Threatened, 17 St. Mary's L.J. 1181 (1986).

2. Kevin Smith, Texas Municipalities' Thurst For Water: Acquisition Methods For Water Planning, 45 Baylor L.Rev. 685 (1993).

3. Wells A. Hutchins, The Texas Law of Water Rights, (1961).

TEXAS ADMINISTRATIVE CODE
Title 30. Environmental Quality
Part 1. Texas Natural Resource Conservation Commission
Chapter 297. Water Rights, Substantive

1. § 297.1. Definitions

2. § 297.21. Direct Diversion

3. § 297.22. Diversion from a Reservoir

4. § 297.24. Off-Channel Reservoir

5. § 297.42. Additional Limitations

6. § 297.45. Return and Surplus Waters

7. § 297.52. Instream Uses

8. § 297.91. Use of bed and Banks

9. § 297.94. Duties of Others along the Stream

10. § 297.101. General; Exceptions

11. § 297.102. When Application Required

12. § 297.103. Special Requirements for Downstream Sales of Water from a Storage Reservoir

Water Rights, Procedural

13. § 295.8. Return and Surplus Water

14. § 295.71. Applications to Amend a Permit

15. § 295.81. Application

16. § 297.1. Definitions

A Survey of Reclaimed Water Rights For the State of Alaska

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

Elizabeth Thomas, Adam Gravley, Molly Hemmen Schladetzky

Preston Gates and Ellis

Alaska Water Reuse Law

Summary

Regulation of Reused Recycled or Reclaimed Water

The State of Alaska does not, at the present time, have laws and regulations which concern the reuse and reclamation of water or wastewater. The state does not plan to address issues of water reuse or reclamation in the near future, according to the Chief of the Water Resources Section of the Alaska Department of Natural Resources ("DNR"). However, the DNR is aware of the programs being instituted in other states and plans to keep abreast of the issue in the event Alaska decides to change its water policies in the future. At the present time, however, Alaska has significant unallocated water resources and has no need to develop alternatives to virgin water.

Acquisition of Rights to Reclaimed Water

Although Alaska has no programs to address recycled or reclaimed water, it does have a system of water rights which would likely be the basis for a reclaimed water allocation program should one be developed. Rights to Alaskan water are allocated by the state under a permitting system. *See* Alaska Water Use Act AS §46.15 and 11 AAC Chapter 93. The first person to apply for a use of water has first priority to the volume of water requested. AS § 46.15.050. An application for appropriation of water must include the use proposed for the water, when, where and how mush water will be taken and discharged, and descriptions of any impoundment structures to be used. 11 AAC 93.040(c). The state DNR then issues a water right permit if the DNR finds that (1) the rights of a prior appropriator will not be unduly affected; (2) the means of diversion are adequate; (3) the use of the water is beneficial; and (4) the appropriation is in the public interest. AS § 46.15.080. These same factors are likely to be used in the allocation of rights to reclaimed water in the future.

Reuse or Sale of Reclaimed or Recycled Water by the Original Water Right Holder

Alaska has no provisions for the reuse or sale of recycled or reclaimed water. Therefore, it is likely that a water right holder may use and reuse the water held under its water right for beneficial uses as long as the reuse does go against the public interest.

Effect of Water Reuse on Third Parties or Other Water Users

Alaska has no provisions to address the impact of water reuse or reclamation on third parties or other users of water. However, the Alaska water rights system includes a requirement for the reservation of in-stream flows and levels of water. AS § 46.15. Whether this reservation system could be used as a basis for preventing or regulating the removal of effluent from a stream is not apparent from the law and has not been considered by the Alaska Courts.

Effect of Water Reuse on Natural Environment

While Alaska's laws do not directly address the issue of water reuse on the natural environment, the Alaska Constitution requires that "all surface and subsurface waters reserved to the people for common use [be] subject to appropriation . . . [Appropriation] of water shall be limited to stated purposes and subject to preferences among beneficial uses . . . and to the general reservation of fish and wildlife." Alaska Const. art. VIII, sec. 13. The Alaska statutes also contain provisions for the protection of instream flows. AS § 46.15. The reuse of discharged water or effluent and removal of the water from a stream may cause negative impacts on fish and wildlife and, therefore be limited by the state laws.

Rights to and Reuse of "Foreign" Water

Alaska's water rights system does not consider the difference between water removed from and returned to the same water body and that removed form a foreign water body and imported for use and discharge.

Issues and Dimensions

1. *Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the State:*

Alaska does not have any laws and regulations concerning water reuse and reclamation. Rights to Alaskan water are appropriated by the state under a permitting system. *See* Alaska Water Use Act AS §46.15 and 11 AAC Chapter 93. The priority of appropriation gives prior rights to water. AS § 46.15.050

A. *Is the water regulated as:*
   - (a) *Surface Water*
   - (b) *Ground water*
   - (c) *Developed water*

Alaska does not have provisions for regulating reclaimed water.

B. *What terms are used to define reclaimed water? For example: wastewater, recycled water, etc.*

Alaska does not have provisions for the regulation of recycled, reclaimed, salvaged, or reused wastewater, etc.

C. *How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?*

Alaska does not have provisions for the regulation of recycled, reclaimed, salvaged, or reused wastewater, etc. However, the state does have a system of water rights which would likely be the basis for a reclaimed water allocation program should one be developed. Rights to Alaskan water are allocated by the state under a permitting system. *See* Alaska Water Use Act AS §46.15 and 11 AAC Chapter 93. The first person to apply for a use of water has first priority to the volume of water requested. AS § 46.15.050. An application for appropriation of water must include the use proposed for the water, when, where and how much water will be taken and discharged, and descriptions of any impoundment structures to be used. 11 AAC 93.040(c). The state DNR then issues a water right permit if the DNR finds that (1) the rights of a prior appropriator will not be unduly affected; (2) the means of diversion are adequate; (3) the use of the water is beneficial; and (4) the appropriation is in the public interest. AS § 46.15.080. These same factors are likely to be used in the allocation of rights to reclaimed water in the future.

D. *Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses? For example: surface spreading, wetlands creation, golf courses, or industrial uses.*

Alaska does not have provisions for permitting the use of recycled, reclaimed, salvaged, or reused wastewater, etc.

2. *How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?*

Alaska has no provisions for the reuse or sale of recycled or reclaimed water. Therefore, it is likely that a water right holder may use and reuse the water held under its water right for beneficial uses as long as the reuse does go against the public interest.

A. *Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?*

Alaska water law does not specifically include or exclude the use of wastewater of reclaimed water from the scope of the original permit. However, permits are obtained by the permittee for specific uses. The DNR may refuse to issue a permit if the use of the water or provisions for the water's discharge do not fall within the standards set out in the statute. AS § 46.15.080.

B. *What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?*

Alaska's water rights program requires potential users to apply for a water right permit. The permit may be issued with a time limit for perfecting appropriation. During this time period, the state DNR may cancel the permit if "the permittee ... (2) violates a term or condition of the permit." 11 AAC 93.125. If the use of the water has been established as a permit term, it is likely that the DNR could cancel a permit if the reuse of the water is beyond the scope of the permit; however, this issue has not been addressed in Alaska.

After a permit has been issued and perfected, a permittee receives a "certificate of appropriation of water." 11 AAC 93.130(a)(1). This provide the holder with a full and permanent property right in the quantity of water. (Although the right may be lost if abandoned or not put to a beneficial use for a period of five years.) AS 4§46.15.050(b); AS 46.15.140(c). Once a certificate is issued, the DNR does not have the same cancellation power as it had during the permitting period.

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right for the secondary use?

Alaska has no provisions for allowing or preventing a permitee from use wastewater or recycled water.

(ii) Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? Do states restrict reclaimed water to particular manners of use?

Alaska has no provisions for regulating the reuse of water.

(iii) Do states restrict the use of reclaimed water to a particular place.

Alaska has no provisions for regulating the reuse of water.

3. *Under what circumstances, if any, have states considered the rights or interest of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?*

Although Alaska has not addressed the issue of reclamation of water, the water rights system does include a system for the reservation of in-stream flows and levels of water. Whether this reservation system could be used as a basis for preventing or regulating the removal of effluent from a stream is not apparent from the law and has not been considered by the Alaska Courts.

A. Can wastewater and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?

Alaska has no provisions addressing these issues.

(i) Is the source of water important?

Alaska has no provisions addressing these issues.

(ii) Is the use of imported water by the importer restricted by third party claims?

Alaska has no provisions addressing these issues.

(iii) Does equity play a role in determining who is entitled to the use of wastewater? For example, does the party that incurs the labor and expense have a superior right to the water against third party claims?

Alaska has no provisions addressing these issues.

4. *Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?*

The Alaska laws and regulations do not address this issue. However, the Alaska Constitution requires that "all surface and subsurface waters reserved to the people for common use [be] subject to appropriation . . . [Appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses . . . and to the general reservation of fish and wildlife." Alaska Const. art. VIII, sec. 13. The Alaska statutes also contain provisions for the protection of instream flows. AS § 46.15. Therefore, reuse of effluent and removal of the effluent from a stream may be interpreted as an interference with someone else's right to the water. Additionally if the removal of the wastewater from the stream adversely affects wildlife, it may be possible for the DNR to prevent the reuse of the water in order to comply with the constitution and water laws.

A. *Does the introduction of wastewater, into a natural stream system, which then increases the volume of the natural stream, then become part of the natural stream by entry therein?*

Alaska has no provisions addressing these issues.

B. *Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?*

Alaska has no provisions addressing these issues. However, protection of fish and wildlife is mentioned as a limitation on the appropriation of water. Therefore, it is probable that the state would consider the introduction of water into a stream which enhances the fish and wildlife as a beneficial use of water.

(i) *Is a permit necessary for instream uses of waste water or recycled water?*

Alaska has no provisions addressing these issues.

5. *How have other states considered the rights of third parties, including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins?*

Alaska has no provisions addressing these issues.

A. *Is wastewater created from the use of foreign waters and reintroduced into a natural stream considered vagrant or fugitive water and subject to third party use?*

Alaska has no provisions addressing these issues.

6. *Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged ground water or augmented surface flows that derive from the use of reclaimed water for these purposes?*

Alaska has no provisions addressing these issues.

A. *Is there a different analysis if the generator is an entity other than the holder of the original water right?*

Alaska has no provisions addressing these issues.

7. *What other re-uses of water may be analytically similar to reuse of potable water effluent?*

Alaska has no provisions addressing these issues.

8. *What issues pertaining to the use of reclaimed water are unique to the particular state*

Alaska has no provisions addressing these issues.

9. *What is the role/authority of Indian tribes, Bureau of Reclamation, Corps. of Engineers, or other Federal laws?*

Alaska has no provisions addressing these issues.

Key Cases

There are no cases in Alaska Courts, or in Federal Courts interpreting Alaska law, pertaining to water reuse, recycling, or reclamation and/or the acquisition of rights to use water in such manner.

Appendix

Bibliography

Alaska Statutes

Alaska Water Use Act AS §46.15

Alaska Regulations

Alaska Water Code 11 AAC Chapter 93

Case Law

Tulkisarmute Native Community Council v. Heinze,
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Conversations with Alaska Agency Personnel

Gary Prokosch Water Resources Section Chief
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Alaska Dept. of Envr. Conservation

A Survey of Reclaimed Water Rights For the State of Hawaii

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

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Water Rights for Use of Reclaimed Water in Hawaii

Prepared by Jane Harvey, Hillis Clark Martin & Peterson, P.S.,
for the State of Washington Attorney General and Department of Ecology
Attorney Work Group on Water Rights for Reclaimed Water

I. Summary

Significant changes have occurred in Hawaiian water law over the past twenty to twenty-five years, and those changes are continuing today. Because the Hawaiian system of water rights is in flux, very little attention appears to have focused specifically on rights for reclaimed water. In addition, important questions which could affect reclaimed water rights are currently unresolved, due to apparent conflicts between the common law and the relatively new Water Code.

Hawaii does not have an appropriative water rights system, and, there continues to be a question whether one may hold an ownership interest in water in Hawaii. The types of rights to use water that are currently recognized in Hawaii are riparian and appurtenant rights, correlative groundwater rights and Native Hawaiian rights. Hawaii adopted a comprehensive Water Code in 1987, following a series of important Hawaii Supreme Court decisions. The Code recognizes existing uses of water, but requires permits for all uses in certain "water management areas." Haw. Rev. Stat. (HRS) §§ 174C-48, 174C-50.

Neither the Water Code nor existing Hawaiian case law specifically addresses reclaimed water rights. While the Code and common law would likely accommodate water rights for reclaimed water, if separate rights are required at all, there are several potential problems. The most significant issues center on whether water may be used outside of the basin from which it was withdrawn, and, for appurtenant and riparian rights, the fact that water under these rights may not be used on lands other than those to which the rights originally attached.

II. Responses to Work Group Issues and Dimensions

1. Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?

To date, Hawaii has not regulated reclaimed water under the water rights laws of the state. There are, however, several projects involving reclaimed water which are under way in the state. The Attorney General's office is negotiating with municipal generators of wastewater in the context of NPDES permit authorization, and is currently encouraging reclaimed water projects. Telephone conversation with Deputy Attorney General Larry Lau, 8/1/96. In one reclaimed water project under negotiation, the City and County of Honolulu may generate reclaimed water for discharge on the Ewa Plain, which would in turn be used for agriculture. Telephone

conversation with Deputy Attorney General Bill Tam, 8/7/96. The discharge is expected to be via groundwater infiltration or injection, to augment a brackish "caprock" aquifer, from which new groundwater wells would then withdraw the water for irrigation. *Id.* If the reclaimed water is discharged in this way, the Attorney General's office anticipates requiring permits for the subsequent withdrawals, which would be analyzed under the state's groundwater law, which follows the correlative rights doctrine. *Id.; City Mill v. Honolulu Sewer and Water Comm'n,* 30 Haw. 912 (1929). In the event of discharges which are directly applied to a use, however, it is unclear whether or under what circumstances a permit would be required. Telephone conversation with Deputy Attorney General Bill Tam, 8/7/96.

A. Is the water regulated as:

(a) Surface water
(b) Ground water
(c) Developed water

To date, water rights have not been required for reclaimed water. See above.

B. What terms are used to define reclaimed water? For example: wastewater, recycled water, etc.

The State's Water Code does not include a reference to reclaimed water, or to any of its synonyms. Haw. Rev. Stat. (HRS) § 174C. The Water Pollution Code, however, does include two references, one to "reclaimed water" and one to "gray water." HRS §§ 342D-4, 342D-70. Reclaimed water is not defined, but gray water is defined as "any water from the domestic plumbing system of a residence except toilets; provided that the discharged gray water is not contaminated with any household hazardous waste as defined in section 342G-1 or any other contaminant the department deems appropriate." HRS § 342D-70. That section of the Water Pollution Code provides that the Health Department may authorize a county to implement a "gray water recycling program" which permits gray water to be used to irrigate lawns and gardens. HRS § 342D-70.

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?

As discussed above, to date Hawaii has not recognized or required water rights for reclaimed water.

D. Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses? For example: surface spreading, wetlands creation, golf courses or industrial uses.

Under the Water Code or Hawaiian common law, this is unclear. However, the Water Pollution Code does provide for irrigation uses. See (1)(B), above.

2. How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?

This has not been specifically addressed in Hawaii. With respect to appurtenant or riparian water rights, the *McBryde* and *Reppun* decisions indicate that uses of reclaimed water would not be permitted on land other than the land appurtenant to the original rights. *McBryde Sugar Co. v. Robinson,* 54 Haw. 174, 504 P.2d 1330, 1341 (1973); *Reppun v. Board of Water Supply,* 65 Haw. 531, 656 P.2d 57, 70-71 (1982). The Water Code, however, does allow the Water Commission to approve the transport and use of water outside of the watershed from which it is derived, but this section only applies in specially designated water management areas. HRS § 174C-49(c). It is therefore unclear the extent to which limits on appurtenant and riparian rights may work to prevent the use of reclaimed water.

A. Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of an original water right? If so, how?

This has not been addressed in Hawaiian law.

B. What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?

See (2), above.

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use? For example: if the original permit is for municipal use of water, can the permittee recycle the water and use it for surface spreading or industrial uses without first obtaining a permit? If so, how?

This has not been addressed in Hawaiian law, but see (2), above.

(ii) Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? i.e. Do states restrict reclaimed water to particular manners of use?

To date, permits have not been issued for use of reclaimed water in Hawaii.

(iii) Do states restrict the use of reclaimed water to a particular place. For example, Is the use of reclaimed water restricted to the same place of use as the water that generated the wastewater?

See (2), above.

3. Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source.

Under the law applicable to riparian and correlative rights in Hawaii, consideration of other water users may be required when one is considering reuse or sale of reclaimed water which would otherwise be discharged to a stream or other water source. For instance, riparian water right holders are entitled to the natural flow of a watercourse, and any diminution in that flow which harms a riparian user may be enjoined. *Reppun,* 656 P.2d at 72. In addition, the Water Code provides for the establishment of instream flow standards which may also come into consideration in this instance. HRS § 174C-71.

A. Can wastewater and/or recycled water be considered within the common law waste, seepage and return flow doctrine wherein third parties can make appropriations of these waters?

To the extent they apply in Hawaii, these doctrines have not been sufficiently developed to determine how they might apply to reclaimed water.

(i) Is the source of water important?

(ii) Is the use of imported water by the importer restricted by third party claims?

(iii) Does equity play a role in determining who is entitled to the use of wastewater? For example: does the party that incurs the labor and expense have a superior right to the water against third party claims?

4. Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?

This has not been addressed in Hawaiian law, however, if the use of reclaimed water were considered under the state's permitting scheme, consideration of overall water availability and instream flow levels would be required. HRS § 174C-49.

A. Does the introduction of wastewater and/or reclaimed water, into a natural stream system, which then increases the volume of the natural stream, then become a part of the natural stream by entry therein?

This has not been addressed in Hawaiian law.

B. Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?

This has not been addressed in Hawaiian law.

(i) Is a permit necessary for instream uses of waste water and/or recycled water?

5. How have other states considered the rights of third parties, including other water users, when these third parties are benefited by wastewater discharges created from the use of water which has been imported from other basins?

It is not clear whether reclaimed water may be transported to other basins under Hawaiian water law. See (2), above.

A. Is wastewater, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?

6. Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged groundwater or augmented surface flows that derive from the use of reclaimed water for these purposes?

Hawaiian water law does not address this question.

A. Is there a different analysis if the generator is an entity other than the holder of the original water right?

7. What other re-uses of water may be analytically similar to re-use of potable water effluent?

Hawaiian water law does not address this question.

8. What issues pertaining to the use of reclaimed water are unique to the particular state?

As discussed above, the question of water rights for use of reclaimed water have not been addressed in Hawaii.

9. What is the role/authority of Indian Tribes, Bureau of Reclamation, Corp. of Engineers, or other Federal laws?

The Water Code specifically protects Native Hawaiian water rights from diminution or extinction due to the operation of the Code. Therefore, any use of reclaimed water reclaimed water permitted under the Water Code could not adversely affect Native Hawaiian rights.

III. Case and Statutory Summary

A. Relevant Water Rights Cases

***City Mill Co., Ltd., v. Honolulu Sewer and Water Comm'n*, 30 Haw. 912 (1929)**

Background: City Mill challenged the Honolulu Sewer and Water Commission's denial of City Mill's application for a permit to construct a well to provide water for domestic use for residences and commercial establishments. The Commission had denied the permit application because of the threat of salt water intrusion that additional groundwater withdrawals would pose to existing wells.

Decision: The Hawaii Supreme Court ruled that the doctrine of correlative rights governs groundwater withdrawals in Hawaii, and therefore the Commission could not deny City Mill's application without first attempting to limit the withdrawals of other existing well users in the same basin. The court observed that, under the correlative rights doctrine, "a diversion of water to lands other than that of origin might, perhaps, be permitted under some circumstances. . . ." 30 Haw. at 923.

***McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973)**

Background: Land owners in the Hanapepe Valley on the Island of Kauai petitioned for a determination of their water rights to the waters of the Koula stream and Hanapepe river. The parties included McBryde, Gay & Robinson, and the State of Hawaii. All three of those parties appealed the trial court's determination of their water rights.

Decision: The Hawaii Supreme Court made several significant rulings in this case, which are viewed as having changed Hawaiian water law. The court's rulings are premised on a reanalysis of the bases of Hawaiian water law, including 1) ancient Hawaiian custom, 2) the laws established during and shortly after the "Great Mahele of 1848," in which Kamehameha III distributed lands to the Hawaiian people, and 3) English common law, which was imported into Hawaiian law due to the influence of missionaries from Massachusetts. First, the court ruled that the water in natural watercourses, streams and rivers is owned by the people of Hawaii for their common good, and therefore landowners with appurtenant or riparian water rights hold only the right use water, not a property interest in the water itself. The court also ruled that water withdrawn under appurtenant and riparian water rights could not be transported to another watershed. Finally, the court ruled that, in Hawaii, there are no rights to "surplus" flow in a river or stream, because such surplus rights would conflict with

riparian rights to the natural flow of a stream, and no one may acquire prescriptive rights to water, because such rights would constitute a claim against rights held by the State.

***Reppun v. Board of Water Supply,* 65 Haw. 531, 656 P.2d 57 (1982)**

Background: Plaintiffs, who were farmers with appurtenant and riparian rights to withdraw water for irrigation and domestic use from the Waihee stream, brought suit to enjoin withdrawals affecting the flow of the Waihee stream by the Board of Water Supply of the City and County of Honolulu. Lower flows in the stream, as a result of increased groundwater withdrawals by the Board of Water Supply, had apparently resulted in the growth of a fungus which destroyed the farmers crops. The farmers maintained that their water rights entitled them to "fresh" flows from the stream, which in turn required a minimum flow level. The Board of Water Supply maintained that it in fact owned all of the water rights asserted by the farmers, and that the Board's water withdrawals could not be enjoined because they were from a groundwater source and for public use.

Decision: The court first analyzed the farmers' riparian rights, confirmed its holdings in *McBryde*, and provided further analysis of the ancient Hawaiian doctrines which the court viewed as supporting *McBryde*. The court then ruled that Hawaiian riparian rights are analogous to federal reserved water rights under the doctrine of *Winters v. United States,* 207 U.S. 564 (1908). Therefore riparian rights could not be transferred to the Board of Water Supply or severed from the land in any way. Rejecting the reasonable use standard for riparian rights, the court further ruled that riparian owners are entitled to the natural flow of a stream, and to use such waters without prejudicing the riparian rights of others. In this case, therefore, the riparian owners were entitled to insist on the maintenance of minimum flows in the stream that would ensure no damage to their uses. The court also decided that appurtenant water rights could not be separated from the lands to which they are appurtenant, and that the attempted transfer in this case operated to extinguish certain of the appurtenant rights altogether. Finally, the court ruled that surface water rights may be protected from injury due to groundwater diversions if there is a demonstrated interrelationship between the relevant surface and groundwater.

B. Water Code

HRS § 174C-3. "'Reasonable-beneficial use' means the use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose, and in a manner which is both reasonable and consistent with the state and county land use plans and the public interest."

HRS § 174C-49. New water uses are required to have permits if they are within a water management area, those areas in which the Commission has determined that water resources are "threatened." HRS § 174C-44. In order to receive a permit, an applicant must establish that the use can be accommodated by the water source, that it is "reasonable-beneficial" (as defined above) and that it will not interfere with existing legal uses of water.

HRS § 174C-49(c). This sub-section authorizes the Water Commission to approve the transport and use of water outside of the watershed from which it is derived. This section, however, only applies in water management areas. Such transfers may only be approved if the Commission determines "that such transport and use are consistent with the public interest and the general plans and land use policies of the State and counties." HRS § 174C-49(c).

HRS § 174C-50. Existing water uses within water management areas require a permit. Existing uses may be permitted if they are determined to be a reasonable-beneficial use and are "allowable under the common law of the state."

HRS § 174C-54. When two or more permit applications for new water uses would require a quantity of water which is not available from the relevant water source, the Water Commission is to attempt to allocate the water so that it may be shared by the competing applications, or, if that is not possible, approve the application which best serves the public interest.

HRS § 174C-62. When the Water Commission determines there is a water shortage, it is authorized to require water use reductions for all uses within a water management area.

HRS § 174C-71. The Water Commission is authorized to determine instream flow standards "whenever necessary to protect the public interest in waters of the State."

HRS § 174C-101. Native Hawaiian water rights are protected under the water code, and may not be diminished or extinguished by operation of the water code.

C. Water Pollution Code

HRS § 342D-4. This section places the responsibility for prevention, control, and abatement of water pollution with the Health Department, including "the control [of] all management practices for sewage sludge and reclaimed water, whether or not such practices cause water pollution."

HRS § 342D-70. Provides for Health Department authorization of any county to implement a "gray water recycling program within its jurisdiction," allowing gray water to be used to irrigate lawns and gardens. "Gray water" is defined as "any water from the domestic plumbing system of a residence except toilets; provided that the discharged gray water is not contaminated with any household hazardous waste as defined in section 342G-1 or any other contaminant the department deems appropriate."

IV. Bibliography and Resource List

A. Cases

City Mill Co., Ltd., v. Honolulu Sewer and Water Comm'n, 30 Haw. 912 (1929)

McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973)

Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982)

B. Statutes

HRS Ch. 174C

HRS §§ 342D-4, 342D-70

C. Agency Contacts

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State of Hawaii Department of Conservation: (808)389-2081

Rae Loui, State of Hawaii Water Commission: (808)587-0214

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A Survey of Reclaimed Water Rights For the State of Florida

A Report to the Attorneys' Work Group

Convened by the Washington State Department of Ecology

June to August, 1996

By:

Rachael Paschal

Center for Environmental Law and Policy

Reclaimed Water Rights

FLORIDA[1]

I. Summary

In 1972 Florida switched from a common law riparian rights system of water law to statutory permit-based system. The Water Resources Act of 1972 terminated common law riparian rights in both ground and surface waters. All riparian owners were required to convert their common law right to a term limited permit-based right within two years. Only domestic consumption by individual users is exempt from the permit requirement.

Permits are issued by regional water management districts when the applicant can show "reasonable-beneficial use." Such uses must not interfere with any existing legal use and must be in the public interest. There is no requirement of riparian ownership and water may be freely transferred throughout the state.

The use of reclaimed water is strongly encouraged in Florida through the wastewater treatment plant permitting laws, which require treatment plants to prepare studies regarding the feasibility of re-use options. The plants then enter into contracts to provide reclaimed water to individual users. Certain new water uses (e.g., golf course irrigation) may not access potable water supplies unless reclaimed water use is determined to be entirely infeasible.

Implementation of the Florida reclaimed water statute varies widely around the state according to climate, hydrology, and economics. Only one appellate decision on the statute is reported. Several administrative law appeals have contributed to development and interpretation of the re-use regulations.

II. Issues and Dimensions

1. Do other states regulate and administer the beneficial use of wastewater effluent and/or reclaimed water as a use from a source of water subject to the water rights laws of the state?

The Florida water resources statute and implementing regulations encourage the use of reclaimed water, declaring such use to be a state objective and in the public

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[1]Prepared by Rachael Paschal, Center for Environmental Law & Policy.

interest.[2] All domestic wastewater treatment facilities within "water resource caution areas" must prepare feasibility studies for the use of reclaimed water.[3]

Water allocation law is implemented by five regional water management districts in Florida. The statute directs the districts to adopt rules governing and promoting the use of reclaimed water by applicants for new consumptive use permits and renewals of existing consumptive use permits.[4] The statute also requires applicants for domestic wastewater treatment permits to analyze whether reuse is technically, economically, and environmentally feasible.[5] Thus, water rights law and re-use law are integrated within the water allocation process.

Reclaimed water, however, is not clearly subject to Florida's water laws.[6] That is, water management districts do not apply the "reasonable-beneficial" test to the use of reclaimed water. Use of reclaimed water by a consumptive use applicant[7] is limited to water provided by domestic treatment plants permitted and operated under an approved reuse program.

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[2]See Florida Statutes Annotated (F.S.A.) Sec. 373.250 (1994) and Florida Administrative Code (F.A.C.) 62.610 *et. seq.* (1995).

[3]F.S.A. 403.064. Water Resource Caution Areas are defined as geographic areas identified by a water management district as having existing water resource problems or areas in which water resource problems are projected to develop during the next twenty years. F.A.C. 62-40.210 (33). Examples of water resource problems include limited potable supplies, increasing demand, ground water declines, etc. F.A.C. 40A-2.802 (designating certain counties and watersheds as Water Resource Caution Areas).

[4]F.S.A. 373.250(5).

[5]F.S.A. 403.064.

[6]Personal communication with Elizabeth Roth, Assistant Attorney General, South Florida Water Management District, August 15, 1996.

[7]Florida, formerly a common-law riparian state, now requires water users to obtain consumptive use permits for all use except domestic consumption by individuals. Such use must be "reasonable-beneficial," must "not interfere with any existing legal use of water," and must be "consistent with the public interest." F.S.A. 373.223.

A. Is the water regulated as:

(a) Surface water

(b) Ground water

(c) Developed water

Under Florida's statutory scheme, no distinction is made between surface, ground and developed water for water allocation purposes. Any consumptive use by anyone other than an individual requires a permit and must be "reasonable-beneficial."

The reclamation and re-sale of wastewater effluent by domestic treatment plants appears, however, to be an exception to this requirement. Treatment plants are not required to obtain consumptive use permits. Further, the reclaimed water developed by treatment plants is available as a substitute for consumptive use permits issued to individual water users.

B. What terms are used to define reclaimed water?

The Florida Statute uses the term "reuse of reclaimed water."[8] "Reclaimed water" is defined as water "that has received at least secondary treatment and is reused after flowing out of a domestic wastewater treatment facility."[9]

C. How are rights to reclaimed water acquired? Is the right acquired as any other water right under state law, or are there specific statutes relating to the appropriation of waste water?

Florida distinguishes between the regulation of a wastewater treatment plant[10] to provide reclaimed water and the regulation of a consumptive use applicant to apply reclaimed water to use. Construction or modification of reuse systems by treatment facilities requires an appropriate permit certifying that the facility has complied with specific reuse and land application requirements.[11] Reuse permits are typically combined with a wastewater treatment plant's operating permit, although they may be issued separately.[12]

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[8]F.S.A. 373.250.

[9]F.A.C. 62-40-210 (21); F.A.C. 62-610.200 (39).

[10]The rules apply only to domestic wastewater treatment facilities. F.A.C. 62-610.110(1).

[11]F.A.C. 62-610.800(1). Such requirements include plant design criteria, separation of reclaimed water from drinking water, and monitoring requirements.

[12]F.A.C. 62-610.800(5).

The water district will not issue a permit for the use of reclaimed water to an individual property owner.[13] Rather, the Florida rules state that the wastewater management facility, not the individual user is subject to state regulation. The facility is required to regulate and manage the individual users of the reclaimed water though binding contractual arrangements. Local governments may also enact ordinances to govern the use of reclaimed water.

Although the water management district will not issue reuse permits to individual water users, it may require a permit applicant to use reclaimed water as a condition for issuing or renewing a consumptive use permit.

Although the statutory system is designed to promote the use of reclaimed water, the conditions for such a requirement are numerous. For example, reclaimed water must be available. Reclaimed water is presumed available to a consumptive use permit when "a utility exists which provides reclaimed water, which has uncommitted reclaimed water capacity,[14] and which has distribution facilities, which are initially provided by the utility at its cost, to the site of the affected applicant's proposed use."[15] Also, reclaimed water use must be "feasible." Water reuse may be deemed economically infeasible if the treatment plant charges more for reclaimed water than the applicant must pay for new water.[16]

D. Is the permit for the use of wastewater effluent and/or reclaimed water limited to specific uses? For example: surface spreading, wetlands creation, golf courses, or industrial uses.

If the technical requirements are met, reclaimed water may be used for landscape irrigation, agricultural irrigation (with limitations on edible crop irrigation), aesthetic uses (decorative ponds and fountains), ground water recharge, industrial uses, environmental enhancement of surface waters resulting from discharge of reclaimed water having received at least advanced wastewater treatment or from discharge of reclaimed water for wetlands restoration, fire protection, and other useful purposes.[17]

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[13]F.A.C. 62-610.490.

[14]"Uncommitted" means the average amount of reclaimed water left over after the utility has fulfilled its contractual obligations to other consumers of reclaimed water in low flow months. F.S.A. 373.250(2)(a).

[15]F.S.A. 373.250(2)(b).

[16]Pers. comm. with Elizabeth Roth, August 13, 1996.

[17]F.A.C. 62-610.200 (41).

2. How do other states interpret the authority and obligations of water right holders to use or sell wastewater effluent or reclaimed water derived from the water right holder's first use of water?

A. Does the state law expressly include or exclude the use of wastewater or reclaimed water within the scope of the original water right? If so how?

The Florida statute creates an entirely separate permitting system for the reuse of reclaimed water. The consumptive use permittee has no ownership control over the water once it has been discharged to the wastewater treatment plant. This feature is consistent with the limited nature of water permits under Florida law (e.g., term limited permit system).

The wastewater treatment facility and/or local government controls re-use of water, subject to regulations promulgated by the state Department of Environmental Protection and the regional water management district.

B. What authority or role does the state have for the use of reclaimed water to the extent its use is beyond the scope (quantity, place of use, purpose, etc.) of the original water right?

(i) Do the states allow the secondary use of wastewater and/or recycled water by the original permittee without a water right permit for the secondary use? For example: if the original permit is for municipal use of water, can the permittee recycle the water and use it for surface spreading or industrial uses without first obtaining a permit? If so how?

Only domestic wastewater treatment facilities may obtain a permit to provide reclaimed water for reuse. The facility must get a new permit for expansion of the reclaimed water distribution system outside of the area designated in an existing permit, addition of a new major user, addition of a new area where crops will be irrigated, or modification of the irrigation system to include edible crops.[18]

[18]F.A.C. 62-610.820

(ii) **Do states impose extraordinary conditions on permits for secondary uses of reclaimed water? I.e., do states restrict reclaimed water to particular manners of use?**

The Florida Department of Environmental Protection has fairly complex health rules concerning the application of reclaimed water.[19]

(iii) **Do states restrict the use of reclaimed water to a particular place? For example, is the use of reclaimed water restricted to the same place of use as the water that generated the wastewater?**

Florida restricts the use of reclaimed to water to a particular place only if there are specific health concerns. The water need not be used in the place it was generated.

3. **Under what circumstances, if any, have states considered the rights or interests of third parties and other water users who have been affected by another water user's decision to reuse or sell effluent or reclaimed water which had otherwise been discharged into a stream or other water source?**

This has not been an issue to date. In theory, a third party is protected by the statutory requirement for protection of existing legal rights in the issuance of consumptive use permits.[20]

The reclaimed water use regulations require that the wastewater treatment facility identify all wells and surface waters within the vicinity of the place of application of reclaimed water.[21] The rules also require that re-use permits contain conditions regarding flow and place of discharge.[22] These requirements appear in the context of regulation to control water quality impacts of reclaimed waters, but could support conditions to protect water quantity impacts as well.

A. **Can wastewater and/or recycled water be considered within the common law waste, seepage, and return flow doctrine wherein third parties can make appropriations of these waters?**

A water user must receive a permit to use water regardless of its source. The permit must be for a use that does not impair other rights or the public interest. The

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[19]F.A.C. Rule Chapter 62-610.

[20]F.S.A. 373.223.

[21]F.A.C. 62-610.310.

[22]F.A.C. 62-610.800.

water, therefore, will be considered available for appropriation if the management district determines that it can be used without harming other water users and without harming the environment.

(i) Is the source of water important?

No. All consumptive uses require a permit.

(ii) Is the use of the imported water by the importer restricted by third party claims?

Yes. Under the "reasonable-beneficial" test, the importer cannot interfere with any existing legal use of water.

(iii) Does equity play a role in determining who is entitled to the use of wastewater? For example: does the party that incurs the labor and expense have a superior right to the water against third party claims?

This issue appears to be inapplicable. The statute establishes that domestic wastewater treatment plants which invest in reuse technology have control over distribution of the reclaimed water.

4. Under what circumstances, if any, have states considered the impact of a decision to use or sell effluent or reclaimed water on overall water availability and the natural environment including instream flow levels?

A. Does the introduction of wastewater and/or reclaimed water, into a natural stream, which then increases the volume of the natural stream, then become a part of the natural stream by entry therein?

No.

B. Is the introduction of wastewater and/or recycled water into a natural stream by a wastewater treatment facility for instream uses a beneficial use of water?

(i) Is a permit necessary for instream uses of waste water and/or recycled water?

Discharge of reclaimed water to the environment by a treatment plant is governed by a water quality permit issued pursuant to the Department of Environmental Protection's treatment standards and regulation of discharges to surface waters.

5. **How have other states considered the rights of third parties, including other water users, when these third parties are benefitted by wastewater discharges created from the use of water which has been imported from other basins?**

   A. **Is wastewater, created from the use of foreign waters and reintroduced into a natural stream, considered vagrant or fugitive water and subject to third party use?**

Because domestic wastewater treatment plants control the distribution of reclaimed water, its temporary discharge to a stream would not make it available for subsequent consumptive use applications.

6. **Under what circumstances, if any, do generators of reclaimed water have any special rights to appropriate and divert recharged ground water or augmented surface flows that derive from the use of reclaimed water for these purposes?**

The law is not specific, but it appears that the wastewater treatment plant which reclaims its effluent may have complete control over that water.

   A. **Is there a different analysis if the generator is an entity other than the holder of the original water right?**

No.

7. **What other re-uses of water may be analytically similar to re-use of potable water effluent?**

None ascertained.

8. **What issues pertaining to the use of reclaimed water are unique to the particular state?**

In south Florida, fresh water is relatively cheap compared to the costs of transporting and buying reclaimed water from public treatment facilities. There is, therefore, very little demand for reclaimed water. The water management district cannot create demand because a users can show that reclaimed water use is not "feasible." In other districts, particularly the St. Johns River Water Management District, re-use of reclaimed water has become a more significant source of supply.[23]

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[23]Recycled Water Use is On Tap, Sun Sentinel, September 27, 1995; Its Time to Sign Up To Reclaim Water, Seminole Extra, January 12, 1995.